IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 388

UNITED STATES OF AMERICA,

Petitioner,

—v.—

ROOSEVELT HUDSON HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

Relevant Docket Entries
District Court

DATE FILED	ORIGINAL PAPER
11-13-67	Indictment
11-14-67	Arraignment Order—plea not guilty
11-14-67	Deft's Motion To Suppress. ORDER—hearing on Motion to Suppress; Motion taken under advisement; briefs to be filed 30-30 days.
11-28-67	Cont. to 4-2-68 at 9:30 AM.
1-27-68	Deft's Memo. Brief in support of Motion to Suppress.
2-27-68	Memo. Brief on behalf of United States.
4 -2-68	ORDER-Motion to Suppress is overruled.
4 -5-68	TRIAL ORDER-Deft's Motion to reconsider decision overruling motion to suppress is overruled; Deft's Motion to set aside swearing of jury and to continue case is overruled; Evidence for plf. not concluded; cont. to April 8, 1968 at 9:30 AM.
4 -8-68	TRIAL ORDER-At close plf's evidence, motion for judgment of acquittal overruled; deft's renewed motion to suppress overruled; Evidence for deft. began and cont. to 4-9-68 at 9:30 AM.
4 -9-68	TRIAL ORDER-trial concluded; verdict guilty.
4 -9-68	Jury verdict List of exhibits Envelope containing exhibits
4-11-68	Judgment & Commitment; 2 yrs. impr.
4-11-68	Acknowledgement of Court's Advise of Right to Appeal.
4-11-68	Deft's. NOTICE OF APPEAL
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Relevant Docket Entries
Court of Appeals

DATE FILED	ORIGINAL PAPER
4-12-68	Duplicate copy of Notice of Appeal and docket entries
8-30-68	*Certified record* (1 vol. pleadings, transcript and exhibits), filed; and cause docketed
12-17-68	Twenty-five copies of Brief and Appendix for Appellee
12-18-68	Proof of service of brief for Appellee
4 -8-69	Case submitted on briefs without oral argument (Before: Weick, O'Sullivan and McCree, JJ.)
5-28-69	Judgment of the District Court reversed and case remanded
5-28-69	Opinion Per Curiam (McCree, J.)
6-18-69	Mandate issued (No costs taxed) Opinion with mandate
6-30-69	Copy of letter from Clerk of Supreme Court to Solicitor General of the United States advising that an extension of time was granted on 6/26/69 for filing petition for writ of certiorari until July 26, 1969

Eastern District of Kentucky,
Affidavit for Search Warrant

Form A. O. 106

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

June 20, 1967, Davis T. McGarvey, Clerk,
U. S. District Court

Commissioner's Docket No. 5

Case No. 180

UNITED STATES OF AMERICA

vs.

ROOSEVELT HARRIS

AFFIDAVIT FOR SEARCH WARRANT

Before: KELLY CLORE, Commissioner, Pineville, Kentucky.

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) The Roosevelt Harris residence, a 5 or 6 room green sided frame dwelling, and including a red sided outbuilding located about 10 yards from the residence and known as the "Dance Hall", and another outbuilding, and a number of vehicles, the buildings containing basements and attics, and all other appurtenances, these buildings being located at 310 Dansbury Avenue, the 2nd dwelling on the left of Dansbury when approached from North 15th Street, in the City of Middlesboro, Bell County, Eastern District of Kentucky, there is now being concealed certain property, namely Non tax-paid distilled spirits in containers not bearing internal revenue stamps as required by law, which are fit and intended for use in violation of title 26, USC as amended, section 5604(a)(1).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: Roosevelt Harris has had a reputation with me for over 4 years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consummed by purchasers in the outbuilding known as and utilized as the "dance hall", and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons.

RUSSELL R. BAUER,
Special Investigator, A&TTD.

Sworn to before me, and subscribed in my presence, 17th of June, 1967.

KELLY CLORE,
United States Commissioner.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

(At London, November 28, 1967)

No. 14440

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROOSEVELT HUDSON HARRIS, DEFENDANT

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS
AT HEARING ON MOTION TO SUPPRESS EVIDENCE

APPEARANCES:

For the United States:

MR. JAMES F. COOK, Assistant U. S. Attorney
MR. G. WIX UNTHANK, Assistant U. S. Attorney

For the Defendant:

MR. JOHN J. TRIBELL, Middlesboro, Kentucky

UNITED STATES DISTRICT COURT
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TRANSCRIPT OF TESTIMONY AND PROCEEDINGS AT HEARING ON MOTION TO SUPPRESS EVIDENCE

APPEARANCES:

For the United States:

MR. JAMES F. COOK, Assistant U. S. Attorney

For the Defendant:

MR. JOHN J. TRIBELL, Middlesboro, Kentucky

[fol. 2] Case No. 14440, styled United States of America v. Roosevelt Hudson Harris, was called for hearing on defendant's motion to suppress in the United States District Court for the Eastern District of Kentucky, at London, on November 28, 1967, before His Honor, Bernard T. Moynahan, Jr., Judge of said Court.

THE COURT: All right, the United States v. Roosevelt Harris—let the record show the defendant and his counsel are in the courtroom and the attorney for the United States is in the courtroom. I heard you gentlemen yesterday on this matter. I understood that you possibly desired to introduce some evidence, Mr. Tribell—is that right?

MR. TRIBELL: Your Honor, prior to introducing evidence I would like to clarify the position that I have taken here, which seems to be somewhat in slight confusion based upon the way this motion to suppress the evidence is concerned. In this case the federal officer, Mr. Bauer, went to the office of the United States Commissioner, Mr. Kelly Clore, at Pineville and, if you have the record in front of you there, you will see that he [fol. 3] obtained a search warrant against premises of the residence of Roosevelt Harris, and he describes it as a 5 or 6 room green sided frame dwelling, and including a red sided outbuilding located about 10 yards from the residence and known as the "Dance Hall," and another outbuilding, and a number of vehicles. The buildings contain basements and attics and all other appurtenances, these buildings being located at 310 Dansbury Avenue. Now with respect to what Paragraph 3 of my motion to suppress—in Paragraph 2 I state that the affidavit and warrant does not properly describe the premises to be searched. It appears that this warrant served by the officers was served on Roosevelt Harris at his residence at a place where he had a lawful right to be. As a matter of fact, as some of the evidence developed in the case tried yesterday against Anna Kate Taylor, the warrant was read to Mr. and Mrs. Harris inside their premises at the kitchen table. Now this question raised with regard to Paragraph 3 and the inferences brought up there, it applies, I think, to a person who is a guest at another person's house and who are not the owners of the premises. Now the officers might have wandered off the premises onto other premises, and for that reason I want to point out that I think my motion is well taken if they searched some other place other than at the property located at 310 Dansbury Avenue.

[fol. 4] THE COURT: Well, you say in ground 3 of your motion that the alcoholic beverages were not found on the defendant's premises but on the premises of a neighbor. Now can you question the warrant for and on behalf of the neighbor?

MR. TRIBELL: No, but he is here charged with the fruits of the alleged search. Now the United States re-

lied upon Jones v. United States—the Government said that the Court said this:

> "No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress when its fruits are proposed to be used against him. This would, of course, not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched."

Now here they found alcoholic beverages which we allege were on premises not owned or under the control of Mr. Harris here, but the fruits of this search precipitated the officers coming before the Federal Grand Jury and obtaining an indictment against Roosevelt Harris charging him with possession of 6 9/16 gallons of untaxed [fol. 5] alcoholic beverages. Now this search started on his premises and if the affidavit in the search warrant is ruled to be a proper affidavit, then he was properly served, but the officers in their search wandered beyond the confines of his premises and onto another address on Dansbury Avenue.

THE COURT: Well, are you still insisting that the distilled spirits, if any, were found at somebody else's property?

MR. TRIBELL: Well, Your Honor, is there any reason why that the Court would not rule upon and let me make a further comment on Paragraph 1 of my motion to suppress before we get to the other paragraph? If Paragraph 1 is sufficient to—

THE COURT: Well, Paragraph 1, in the opinion of the Court, would raise no issue if the search was made of somebody else's premises. Suppose officers would come to my house with a search warrant and instead of searching my house, they go over and search my neighbor's house and find something. Do I have any standing to complain about that?

MR. TRIBELL: Well, according to the Jones case, when the fruits are proposed to be used against you to

make a prosecution against you, I think you have a right. The Court said Evans' consent to the presence [fol. 6] in the apartment, he was entitled to have the merits of his motion to suppress adjudicated, even though he was a guest there, but he was lawfully there, even though—

THE COURT: Yes, he was a guest, but you say this man wasn't at the premises and didn't have any control over them or have any connection with them, don't you?

MR. TRIBELL: Well, this—

THE COURT: No, just answer me that? Don't you?

MR. TRIBELL: I say that he didn't have any control over the premises where the alcoholic beverages were found.

THE COURT: And he wasn't there.

MR. TRIBELL: He was in his own home when the warrant was served on him, and the warrant was served on him and the warrant specified—

THE COURT: Let me ask you—suppose I take 10 gallons of whiskey and take it over to my neighbor's house and put it in the basement, and they come with a search warrant and they search my house, and then they go over and search my neighbor's house; do I have a right to question the validity of the search warrant if they attempt to introduce in evidence against me what was found at my neighbor's house?

[fol. 7] MR. TRIBELL: Yes, sir, I think that is properly expressed, when the fruits of the search are proposed to be used against you. Suppose your neighbor had ten gallons of whiskey in his house; they come with a search warrant describing your house, and then after they finish that, they wander off and search through the yard and the outbuildings there and wander across the road and search a neighbor's house, then propose to use the fruits of the search in the prosecution against you, then I think that the motion to suppress should properly be considered.

THE COURT: It says this in the Jones case:

> "Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer

strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards."

"No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. [fol. 8] This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched. As petitioner's testimony established Evans' consent to his presence in the apartment, he was entitled to have the merits of his motion to suppress adjudicated."

Now as I understand you in the third ground of your motion, you say this:

"The alcoholic beverages allegedly found by the officers executing the warrant were not found on the premises of the defendant, but on the premises of an adjoining neighbor."

Now was the defendant there:

MR. TRIBELL: He accompanied them through the search.

THE COURT: No, I didn't ask you that. Was he on the adjoining premises?

MR. TRIBELL: No, sir.

THE COURT: What says the United States?

MR. COOK: I might make this observation with respect to the illustration that the Court has given there of one defendant taking certain contraband to the property of a friend and leaving it there, and as to whether or not that person would have a standing to object to [fol. 9] a search of this friend's apartment. The Supreme Court, it seems to me, has said about the same thing in the case of Wong Sun v. United States, a 1963 case, reported in 371 U.S., Page 471. That was a narcotics prosecution. The Court said:

"A defendant who was convicted was held to lack standing to object to the illegal seizure of narcotics from a co-defendant's apartment."

I think that's the same thing as the Court illustrated. The motion to suppress has alleged that these alcoholic beverages were not on the premises of the defendant but on the premises of an adjoining neighbor. We know of no authority by which the defendant would have a standing to object to any search and seizure of property found on the premises of an adjoining neighbor. The Jones case, I believe, authorized the defendant there to have his motion to suppress adjudicated, saying that he had standing because he was on the premises which were searched, and from which the contraband was seized.

MR. TRIBELL: Your Honor, in response to that I would like to interject this. If that is the case, a totally incompetent and invalid affidavit and search warrant can be used or can be the basis and the authority for an offi- [fol. 10] cer going to premises and then searching the premises; when he finds nothing there, goes to a neighbor's, and then charges back the defendant, the person who is named in the search warrant, and used the fruits of the search of the contraband found at a neighbor's house in a prosecution against him; and in that event he would never have an opportunity to determine the integrity or validity of the search warrant. However, I do wish to introduce some proof on this question of whether or not it was on premises owned or under his supervision.

THE COURT: Well, you say it wasn't.

MR. TRIBELL: That's what he tells me, it wasn't.

THE COURT: All right, call your witness.

MR. TRIBELL: I would like to call Mr. Bauer.

TESTIMONY FOR THE DEFENDANT

The first witness called on behalf of the defendant was

RUSSELL R. BAUER

who, being first duly sworn, testified as follows:

[fol. 11] DIRECT EXAMINATION

BY MR. TRIBELL:

Q. 1. State your name, please.
A. Russell R. Bauer.
Q. 2. You are a Special Agent for the Alcohol and Tobacco Tax Division of Internal Revenue?
A. I am.
Q. 3. Mr. Bauer, you were such an officer on June 17, 1967?
A. I was.
Q. 4. And in the course of the performance of your duties did you have an occasion to obtain a search warrant and go to the premises of the residence of Roosevelt Harris?
A. I did.
Q. 5. Do you recognize Roosevelt Harris in the courtroom?
A. Yes, sir.
Q. 6. Is he the man sitting next to me?
A. He is.
Q. 7. And upon entering his premises did you or one of your co-workers, your buddies, or whoever worked with you, worked in the Alcoholic Tobacco Tax Division, go with you?
A. Yes, sir.
[fol. 12] Q. 8. And did one or both of you explain to Mr. Harris that you had a search warrant for his premises and read the warrant to him?
A. The announcement that we were federal officers with a search warrant was made at both front and rear doors before entry was gained into the residence. After that time if the search warrant was read, it was not read by me nor in my presence.

Q. 9. Who was the federal officer that was with you?
A. Special Investigator Easley.
Q. 10. Did you give, or was Roosevelt Harris given a copy of this search warrant?
A. Yes, sir, he was.
Q. 11. What did you find at the premises of Roosevelt Harris?
A. Within the premises itself was a one-half pint bottle of non-tax-paid distilled spirits; a one gallon jug in the sink with a broken top, partially filled with a dilute non-tax-paid distilled spirits.
Q. 12. Did you have that analyzed?
A. I did.
Q. 13. Is the person or persons who performed this analysis present here today?
A. Mr. Derr, the chemist, is here. I don't know of [fol. 13] my own knowledge that he made the analysis.
Q. 14. Mr. Who?
A. Mr. Derr, D-e-r-r.
Q. 15. All right, after you searched, did you search—
THE COURT: Mr. Deer.
THE WITNESS: Mr. Deer—I'm sorry.
THE COURT: All right, go ahead.
MR. TRIBELL: Beg your pardon?
THE WITNESS: It's Mr. Deer.
Q. 16. Did you search the inside of the premises further—the house?
A. Yes, sir.
Q. 17. And the only thing that you found within the walls, the four walls of this house, was one-half pint of untaxed whiskey and a dilute, I believe you call, in a broken jug in the sink with a broken neck.
A. That's correct.
Q. 18. The main body of the jug was intact—is that correct?
A. Yes, sir.
Q. 19. Now in furtherance of your search did you go outside and search under the house or about the house?
A. I did, yes, sir.
[fol. 14] Q. 20. And did you find anything else in performing this search there at the premises?

A. Not under the house or immediately about the house, no, sir.

Q. 21. How far away from the house did you find anything else, if you did?

A. I found one sack containing three gallons of non-tax-paid distilled spirits thirty paces from the rear door of the residence; one sack containing three gallons of non-tax-paid distilled spirits thirty-six paces from the rear door of the residence.

Q. 22. Do you remember the geographical appearance of this area in which you searched?

A. I do.

Q. 23. I am going to use this board here and see if I can make a diagram of it and ask you if this is essentially what you found.

A. I have already made a diagram of it.

Q. 24. Would you let me see a copy of your diagram?

A. Yes. I believe I have it with my case report.

Q. 25. Did you make this diagram while you were there or after you had left there?

A. I made it very shortly after I had left.

[fol. 15] Q. 26. Did you step off the measurement of the paces from the rear of the house, you say?

A. I did, yes, sir.

Q. 27. Well, I am somewhat confused by your diagram, sir. I would like to put one on here and ask you if that is a reasonable facsimile of what you have here. Fifteenth Street runs this way and Dansbury runs perpendicular to Fifteenth Street—is that correct?

A. That's correct. That would be North Fifteenth Street.

Q. 28. Now Dansbury Avenue runs directly to the canal—is that correct?

A. Yes, sir.

Q. 29. And the canal runs something like this to the end of Dansbury Avenue—is that correct?

A. That would be—yes, sir.

Q. 30. No bridge there, is there?

A. Not that I know of.

Q. 31. When you get to the end of Dansbury Avenue, Mr. Harris' house is the last house on the left—is that correct?

A. There is a small shack, or what is known as the dance hall, which would be closer to the canal than his house.

Q. 32. Does it sit something like this, and then his house like this?

[fol. 16] A. Not quite. If that small block is the dance house, it would be up closer to being parallel with the front porch of the house. It would be up alongside the house.

Q. 33. Up this way?

A. No, sir, towards the canal, right in that section there. That's it. Roughly that would be it, yes, sir.

Q. 34. Now is there a house directly across the street here?

A. There is an abandoned house there, yes, sir.

Q. 35. How do you know it's abandoned?

A. Well, the five years I've been in Middlesboro I have never seen any activity nor life in the house.

Q. 36. How many times have you been there in the last five years?

A. Numerous times.

Q. 37. Is there a house located right here beside this, or a shack here beside this abandoned house?

A. Not that I recall.

Q. 38. Now will you come down here and point out on this diagram where you found the alcoholic beverages that you spoke of in your testimony?

[fol. 17] A. This would be North Fifteenth Street; this would be Dansbury Avenue. Here is a house situated here on the corner facing Dansbury Avenue. By clock on my autometer on my vehicle it is 1/20 of a mile from this point to Roosevelt Harris' driveway. There is some type of road which breaks off Dansbury Avenue at this point. This is all a weeded lot. This section here is a weeded lot. The driveway to Mr. Harris' house comes in on this side, or the North Fifteenth Street side of his house. Behind his house, as I recall, there was an outbuilding in this area, there was an outbuilding in this area, and his driveway terminated in this general vicinity. There was an outside toilet in this area, as I recall. There was a branch of water which ran in that direction.

There was high foliage, over six feet. It would be high
than I—which covered this section in here along the cre
branch, or the branch bank. There was high foliage alo
behind this particular outbuilding, which went off
this direction and which enclosed this particular ar
in here, which was of worn grass. It was not high
growth in this area in here. When I first left the pre
ises, I followed a path that went directly to the outsi
toilet. From there I followed a path through this foliag
and it was the only opening that I found through th
[fol. 18] foliage. This came into this section here.
this point here I joined Constable Johnson, and fro
this point here in this foliage at this point, or approx
mately, I found one sack containing three one-gallon jug
There was another path going in this general vicinit
There were matted-down places in the foliage but nothi
there. There was a path that came off in this directi
and within the foliage here there was a matted-dow
place and at that point I found another sack. I return
out this path and followed a well-worn path that broug
me directly back to here. My paces were counted fro
this point up to this point and to the house and fro
this point up to this point and to the house.

Q. 39. Now do you know what the house number
here and lot number?

A. No, I don't. 310, I believe, it is listed as.

Q. 40. Well, anything that you found outside t
Roosevelt Harris house was found over on the next l
was it not?

A. I don't know whose property it is. I followed
path from the defendant's home to that area.

Q. 41. How far would you say it is from right he
to where you enter the driveway?

A. It would be approximately four car lengths. As
[fol. 19] recall, there were three cars parked in the
and a broken down Oldsmobile was towards the rear
the house. And the driveway was pretty well filled wh
we got our car into it.

Q. 42. Would you say it was 100 feet approximatel

A. Yes, I would judge it to be 100 feet.

Q. 43. Then from right here to this point here, how many steps?

A. Thirty-six paces.

Q. 44. And approximately three feet a pace?

A. Yes, sir.

Q. 45. Then it would be approximately 208 feet from this point here to this point here, in your judgment—is that correct?

A. Well, we deducted the paces from the stash to that center point there that you are talking of. That would take off perhaps six or eight paces.

Q. 46. You found one sack in here, in this foliage here?

A. That's right.

Q. 47. How far was it from here to here?

A. I didn't pace that. I paced the total distance.

Q. 48. Did you pace the distance from here to here? [fol. 20] A. No, sir. I paced the distance from each one to the house, although it was on a common path for the majority of the distance.

Q. 49. Did you look in this property over here?

A. I did not.

Q. 50. Was there any shacks or anything in this area here?

A. No, that's all cleared within that foliage. There are two outbuildings before you get to it. That's one, yes, sir.

Q. 51. This one?

A. That would be one.

Q. 52. Do you know who owns this outbuilding?

A. No, sir, I don't.

Q. 53. Did you find anything in this outbuilding up here next to the canal?

A. In the dance hall? I didn't enter that building. I looked through the windows; however, I didn't see anything. It was fairly well cluttered up with junk, as I recall.

Q. 54. Did you find anything in this outbuilding here?

A. No, sir.

Q. 55. Anything in the privy out back?

A. No, sir.

[fol. 21] Q. 56. You prepared all this information on here, did you not?

A. What is that you are holding?

Q. 57. On the affidavit?

A. I did.

Q. 58. And you took this affidavit with your signature on it to Mr. Kelly Clore and he acknowledged your signature—is that correct?

A. I signed it and swore to it in the presence of Kelly Clore.

Q. 59. And then upon the strength of this affidavit you already had a search warrant prepared, did you not?

A. I had prepared the search warrant, yes, sir.

Q. 60. And on the strength of your signing and swearing to this he issued the search warrant?

A. Kelly Clore asked me certain questions before he did.

Q. 61. Now can you tell the Court whether or not the area in which you found a little over six gallons of spirits, whether or not that was on property located at 310 Dansbury Avenue?

A. Not of my own knowledge I cannot.

Q. 62. How much alcoholic beverages did you say [fol. 22] you found in this first area right here?

A. Three one-gallon jugs.

Q. 63. Three gallons?

A. Yes, sir.

Q. 64. How much did you find up here?

A. Three gallon.

Q. 65. And I noticed you testified that you located 6 9/16 gallon there.

A. Yes, sir.

Q. 66. Where did this other 9/16 of a gallon come from?

A. 1/16 would have been the half-pint within the residence; the half-gallon, which was contained within the jug broken in the sink.

Q. 67. Did you charge him with possession of untaxed spirits?

MR. UNTHANK: Object.

THE COURT: Overruled.

Q. 68. In the possession of the one-half pint found inside the premises?

A. Did I charge him with possession of the one-half pint?

Q. 69. Yes, sir.

A. It was encompassed in the total charge.

Q. 70. And he was the only one charged?

[fol. 23] A. Roosevelt Harris was the only one charged of whiskey in this investigation.

Q. 71. Did you have any conversation with him about this whiskey?

A. After he had been advised of his rights, yes, sir.

MR. TRIBELL: I believe that's all.

THE COURT: Anything else?

MR. COOK: No, I have nothing.

THE COURT: All right, step down, Mr. Bauer. Call another.

MR. TRIBELL: Your Honor, may I approach the Bench?

THE COURT: Yes, come up.

The following occurred at the Bench:

Mr. TRIBELL: In light of the testimony of Officer Bauer that he charged the defendant, Roosevelt Harris, with possession of untaxed beverages, namely, the one-half pint found within the confines of the defendant's home, and further confiscated what [fol. 24] he refers to as a diluted substance containing a residue of evidence of untaxed liquor, the defendant moves to strike the third ground alleged in his motion to suppress as a ground for the motion to suppress, but in the event of a trial of this case not as a defense.

THE COURT: What do you want to do, eat your cake and have it, too?

MR. TRIBELL: Your Honor, it is very plausible that I can prove that—I think the affidavit—

THE COURT: Is this what you want to do—you want the motion to suppress to be sustained and then you are going to say it's Roosevelt Harris' property and it wasn't good? Is that right?

MR. TRIBELL: If the motion be sustained, I will say it was Roosevelt Harris' property?

THE COURT: Is that what you want to do?

MR. TRIBELL: No, what I want to do, I want to hear—

THE COURT: Well, are you withdrawing the third ground of your motion?

[fol. 25] MR. TRIBELL: As a ground for my motion to suppress, yes, sir.

THE COURT: All right, Gentlemen, I will hear you on it. All right, any further evidence?

MR. TRIBELL: No, sir.

MR. COOK: I stated yesterday to the Court the position of the United States with respect to the affidavit, and it would be repeitious for me to go over that again in any detail. We submit that the affidavit perhaps finds its basis on hearsay, but that the hearsay is sufficiently corroborated by the testimony of the affiant as to reputation. And for those reasons and the other reasons stated to the Court yesterday we submit that the affidavit is sufficient to support the search warrant.

THE COURT: Well, does the affidavit say in there anywhere that this person had heretofore given reliable information, or is a reliable informant? It says it's a prudent person, but there is no showing of this person's history.

MR. TRIBELL: None.

THE COURT: Is there?

[fol. 26] MR. COOK: Well, of course in that respect the person who is unidentified, there is no information given as to his history except—

THE COURT: That he is a prudent person.

MR. COOK: Prudent person and has given this information to the affiant under oath. However, the other

informant of the affiant—that is, Constable Howard Johnson—has been identified and we think it is not necessary in that circumstance to give as much information, if any, about his reputation.

THE COURT: Of course it says: "Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time." That could be any time within the past four years if it be connected to the preceding sentence.

MR. COOK: That's true, but we think it becomes timely when connected with the other information received by the affiant.

THE COURT: I am inclined to think, under these cases that we discussed here earlier today, that the reliability of the informant must be set out.

MR. COOK: I don't think there is anything more that I can say. The affidavit, as I believe—

THE COURT: As I understood this case when it [fol. 27] started, search was made there, the defendant said, of somebody else's property, but it develops that part of it came out of the house, part of it came out of the field back there behind the house. I don't know whose field it was, whether it was part of the curtilage or whether it was somebody else's property. There has been no showing whose property that was. Of course it might not have even been necessary to have a warrant to search that property. Isn't this affidavit all hearsay, Mr. Cook, with no showing as to the reliability of the informant? Doesn't it boil down to that?

MR. COOK: Basically that's right. We just submit that it is corroborated by the reputation that this defendant had with the affiant.

THE COURT: Well, let me ask you this, Gentlemen —hasn't this jury panel heard too much in this case to try this case, regardless of the outcome of the ruling on this motion?

MR. UNTHANK: Yes, Your Honor.

THE COURT: They have heard the Anna Kate Taylor case tried here and this defendant has testified as a witness. The other jurors were here in the courtroom. The testimony was introduced that they went to this

defendant's house and searched the house and found a half-pint of distilled spirits and an attempt was made [fol. 28] by the defendant's daughter to break this jug of whiskey. What do you have to say about that, Mr. Tribell? You challenge the panel in the event the case goes to trial?

MR. TRIBELL: If Your Honor overrules my motion, yes, sir, I would have to.

THE COURT: Well, I am considering taking your motion under advisement with the thought that it couldn't be tried before this jury at this session of court, anyway.

MR. TRIBELL: Well, I had that in mind, Your Honor. I had discussed it with the United States Attorney.

THE COURT: If I understand you correctly, as attorney for the defendant you make the issue that it couldn't be tried at this session of court before this jury panel, if the motion should be overruled—is that right?

MR. TRIBELL: Yes, sir, that is correct.

THE COURT: Well, on that state of affairs I see where no prejudice could result to the defendant by taking it under-advisement. I will take it under advisement and let the case be continued until the second day of the next term of the court. Yes, Mr. Unthank?

MR. UNTHANK: May I also move the Court that [fol. 29] the counsel for the defendant submit a memorandum opinion and the United States be given thirty days in which to—

THE COURT: All right, I will give each side thirty days to submit a memorandum. You submit yours first, Mr. Tribell, and I will give the United States thirty days to respond. There is a very close question here.

MR. TRIBELL: Is that thirty days from today, Your Honor?

THE COURT: Thirty days from today. All right, let this case be continued until April 2, 1968 at 9:30 A.M.

I, Edna F. Darnell, Official Reporter for the United States District Court for the Eastern District of Kentucky, hereby certify that the foregoing is a true and correct transcript of the tesimony and proceedings at a hearing on defendant's motion to suppress evidence in Case No. 14440 on the London docket, styled United States of America v. Roosevelt Hudson Harris, in the United States District Court, London, Kentucky, on November 28, 1967, before His Honor, Bernard T. Moynahan, Jr., Judge of said Court.

IN TESTIMONY WHEREOF, witness my hand this August 20, 1968.

/s/ Edna F. Darnell
Official Reporter

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18961

[Filed May 28, 1969, Carl W. Reuss, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROOSEVELT HUDSON HARRIS, DEFENDANT-APPELLANT

Decided May 28, 1969

On Appeal from the U. S. District Court for the Eastern District of Kentucky at London

Before WEICK, Chief Judge, O'SULLIVAN and MCCREE, Circuit Judges.

PER CURIAM: Appellant was convicted of possessing non-tax-paid distilled spirits in violation of Section 5205a (2) of the Internal Revenue Code of 1954 and sentenced to two years in prison. The sole question on appeal is the sufficiency of an affidavit used to obtain a search warrant, the execution of which resulted in the discovery of approximately six gallons of whiskey on and about appellant's premises. The District Judge denied a motion to suppress this evidence, rejecting appellant's contention that the affidavit failed to establish probable cause.

The affidavit contained the following recitals: 1) during the past four years, the appellant had a reputation with the affiant of being a trafficker in non-tax-paid whiskey; 2) some time during this four year period a constable had located a cache of whiskey in an abandoned house which was under appellant's control; and 3) an informer who the affiant "found * * * to be a prudent person" had told the affiant, as of the date of the affidavit, that he (the informer) "has personal knowledge of and has purchased illicit whiskey from within the residence [of appellant] for a period of more than 2 years, and most recently within the past 2 weeks," and

that he knew of another person who purchased illicit whiskey at appellant's residence within the past 2 days.

The Supreme Court has held that an affidavit based on hearsay information may establish the probable cause requisite to the issuance of a search warrant if the issuing magistrate is:

> informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant * * * was "credible" or his information "reliable." *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964). *Accord, Spinelli* v. *United States*, 37 U.S.L.W. 4110 (U.S., Jan. 27, 1969).

This court recently applied the test enunciated in *Aguilar*, and decided that "a declaration in the affidavit that the informant visually observed the fact asserted therein would suffice to establish the probability of its existence, provided there was also a substantial basis for confirming the credibility of the informant." *United States* v. *Kidd*, No. 18465 (6th Cir., Feb. 25, 1969). In *Kidd*, the previous reliability of the informant served to confirm his credibility.

A declaration that the informer has purchased whiskey directly from the suspect at his residence is tantamount to an assertion of visual observation by the informer. There is, however, nothing in the affidavit used in this case which would provide a "substantial basis for confirming the credibility of the [unidentified] informant." No information is provided which would enable the magistrate to assess his reliability or trustworthiness. The allegation that he is a "prudent person" signifies that he is circumspect in the conduct of his affairs, but reveals nothing about his credibility. Thus, the information received from the informer was not sufficient to establish probable cause for the issuance of the search warrant.

Of course, in *Spinelli*, *supra*, the Supreme Court held that, "If the tip is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered."

37 U.S.L.W. at 4112. We have done this, and we find the other declarations in the affidavit concerning appellant's reputation and the previous experience of a constable insufficient independent corroboration to overcome the inadequacies related to the informer's credibility. The assertion that appellant had a reputation with the affiant of being a trafficker in illegal whiskey would not, standing alone, establish probable cause. And the Supreme Court has held that this type of statement may not be used "to give additional weight to allegations that would otherwise be insufficient." *Spinelli* v. *United States*, 37 U.S.L.W. at 4113. The statement concerning the constable's discovery of a cache of whiskey gives no indication when, during the previous four years, this episode occurred. Reliance on this assertion would violate the principle that "probable cause must be determined as of the time the warrant is issued." *Schoeneman* v. *United States*, 317 F.2d 173, 177 (D.C. Cir. 1963).

Since the affidavit was insufficient to establish probable cause, issuance of the warrant was improper and the evidence obtained should have been suppressed. The judgment of the District Court is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18961

[Filed May 28, 1969, Carl W. Reuss, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ROOSEVELT HUDSON HARRIS, DEFENDANT-APPELLANT

Before: WEICK, Chief Judge, O'SULLIVAN and MCCREE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was submitted on briefs without oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

No costs awarded. Rule 39(b).
Entered by order of the Court.

CARL W. REUSS,
Clerk.

Issued as Mandate: June 18, 1969
COSTS: NONE
Filing fee ..... $.....
Printing ..... $.....

Total ..... $.....

A True Copy.
Attest:
CARL L. REUSS,
Clerk.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Indictment No. 14440

UNITED STATES OF AMERICA, PLAINTIFF

—*vs*—

ROOSEVELT HARRIS, DEFENDANT

Comes the defendant and moves the court to suppress the evidence in the above styled and numbered action for the following reasons:

(1) The affidavit contained in the search warrant is improper and irregular because it is primarily based on hearsay information and does not contain sufficient information upon which a search warrant could or should have been issued.

(2) The affidavit and warrant does not properly describe the premises to be searched.

(3) The alcoholic beverages allegedly found by the officers executing the warrant were not found on the premises of the defendant but on the premises of an adjoining neighbor.

(4) The affidavit does not state the reputation of the informant upon which the Special Investigator based his information.

WHEREFORE, the defendant moves the court to suppress the evidence in the above styled and numbered action.

This 14th day of November, 1967.

/s/ John J. Tribell
JOHN J. TRIBELL
Attorney for defendant
Middlesboro, Kentucky

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

No. 14,440

U. S. OF AMERICA, PLAINTIFF

vs.

ROOSEVELT HUDSON HARRIS, DEFENDANT

ORDER

On April 2, 1968, it was ORDERED herein as follows:

(1) That the defendant's Motion to Suppress be and it is overruled.
(2) * * *

/s/ Bernard T. Moynahan, Jr.
BERNARD T. MOYNAHAN, JR.
Judge

April 2, 1968

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LONDON

No. 14,440

UNITED STATES OF AMERICA

v.

ROOSEVELT HUDSON HARRIS

On this 11th day of April, 1968 came the attorney fo the government and the defendant appeared in perso and by counsel, John Tribell, a regular practicing atto ney of this court.

IT IS ADJUDGED that the defendant has been convicte upon Verdict of guilty of the offense of Possessing di tilled spirits in unstamped containers, in violation of Se 5205a(2), 1954 Int. Rev. Code, as amended as charge in the Indictment and the court having asked the defen ant whether he or his attorney have anything to sa why judgment should not be pronounced, and no sufficie cause to the contrary being shown or appearing to th Court,

IT IS ADJUDGED that the defendant is guilty as charge and convicted. Thereupon the Probation Officer submitte a pre-sentence report to the Court.

IT IS ADJUDGED that the defendant is hereby committe to the custody of the Attorney General or his authorize representative for imprisonment for a period of Two (2 Years.

IT IS ADJUDGED that the defendant be imprisoned unt he is otherwise discharged as provided by law.

IT IS ORDERED that the Clerk deliver a certified cop of this judgment and commitment to the United Stat Marshal or other qualified officer and that the copy ser as the commitment of the defendant.

/s/ Bernard T. Moynahan, Jr.
United States District Judg

SUPREME COURT OF THE UNITED STATES

No. 388, October Term, 1969

UNITED STATES, PETITIONER

v.

ROOSEVELT HUDSON HARRIS

ORDER ALLOWING CERTIORARI—Filed February 24, 1970

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 381487 605

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

ROOSEVELT HUDSON HARRIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on May 28, 1969, reversing respondent's conviction for possessing distilled spirits upon which the required tax had not been paid.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 9–12) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 13) was entered on May 28, 1969. On June 26, 1969, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to July 26,

357-929—69——1

1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the reliability of information recited in an affidavit for a search warrant is sufficiently established where the affiant states that he obtained this information from an informant in a sworn statement and that the informant impressed the affiant as a prudent person.

STATEMENT

Respondent's conviction in the United States District Court for the Eastern District of Kentucky for possessing nontaxpaid distilled spirits was reversed by the Court of Appeals for the Sixth Circuit on the ground that the affidavit for a search warrant, pursuant to which the distilled spirits were seized, was insufficient to establish probable cause. The affidavit is reproduced in full as Appendix C, *infra*, pp. 15–17.

The affidavit was made by Russell R. Bauer, a special investigator for the Alcohol and Tobacco Tax Division of the Internal Revenue Service. The affiant stated that he had reason to believe that nontaxpaid distilled spirits in containers not bearing internal revenue stamps as required by law were being concealed in a described residence and nearby buildings belonging to respondent. The grounds for such belief were set forth in the following language:

> Roosevelt Harris has had a reputation with me for over 4 years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information from

> all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandonded house under Harris' control during this period of time. This date, I have received information from a person who fears for their life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consummed by purchasers in the outbuilding known as and utilized as the "dance hall", and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons.

The district court sustained the warrant on a motion to suppress. Respondent was thereafter tried before a jury, convicted, and sentenced to imprisonment for a period of two years. In reversing the conviction, the court of appeals held the search warrant to be insufficient on the grounds that the affidavit failed to provide a substantial basis for crediting the informant's statements; that the characterization of the informant as a "prudent person" signified only that he was circumspect in the conduct of his affairs; and that

the other allegations were insufficient to corroborate the information thus received.

REASONS FOR GRANTING THE WRIT

In *Spinelli* v. *United States,* 393 U.S. 410, and *Aguilar* v. *Texas,* 378 U.S. 108, this Court has held that an affidavit reciting information from an informant may be sufficient to provide the basis for issuing a search or arrest warrant, if the affidavit (1) sets forth the underlying circumstances with sufficient specificity to enable the magistrate to make an independent judgment concerning the validity of the informant's conclusion concerning the crime and (2) presents information to show that the informant is credible.

Here the only issue is whether the affidavit in question sufficiently established the credibility of the informant. In the past the Court has recognized that an informant's credibility may be established by showing (1) that he has previously given information that proved reliable (see *McCray* v. *Illinois,* 386 U.S. 300) or (2) that the information given by the informant was corroborated by the investigation of the law enforcement officers involved (see *Draper* v. *United States,* 358 U.S. 307). We ask the Court to grant review in this case because it presents the important question whether these are the exclusive means for establishing the credibility of an informant or whether there are other rational criteria which a magistrate may consider in determining whether what the informant said should be credited.

We believe there are circumstances in which a magistrate should be allowed to issue a warrant on

the basis of information supplied by a person who has never before provided information to the police. Indeed, the person who supplies information to the police on only one occasion will often be a more reliable type of individual than one who supplies such information on a regular basis. The latter is likely to be someone who is himself involved in criminal activity or is, at least, someone who enjoys the confidence of criminals. Cf. *Jaben* v. *United States*, 381 U.S. 214, 224. On the other hand, a hardworking, law-abiding citizen will rarely provide the police with information concerning a crime on more than one occasion. It seems unreasonable to say that a magistrate can rely entirely on information from the former but can rely on information from the latter only if it is corroborated by independent investigation.

This case presents, we submit, a clear example of the type of situation in which there is a sufficient basis for crediting the informant's assertions to permit the magistrate to rely on the informant's statements even though he has not previously provided information.

The affidavit reveals that for two years the informant had personally purchased illegal whiskey from the residence described and had made such a purchase within the preceding two weeks. The informant also knew a person who had made such a purchase within the preceding two days. Unquestionably, if that information were submitted to the Commissioner in an affidavit signed by the informant, it would have constituted probable cause for a warrant. The officer supplying the affidavit explained why the informer's affidavit could not be submitted—because the informer

feared for his life. The affidavit further explained why the officer credited the informer—because the informer had given the information under oath and seemed to the officer to be a "prudent" person.

In finding that the affidavit did not sufficiently establish a basis for crediting the informant, the court below regarded the affiant's statement that the informer was a "prudent" person as being of no weight, and completely ignored the fact that the informant had sworn to the truth of his statement.

We submit that the police officer's evaluation of the person supplying the information is a factor which the magistrate should be allowed to consider along with other information in the case. The police cannot entirely disregard information which comes to them from someone who has not given information in the past. When a person comes to them with information for the first time, they must make a judgment as to whether the man is the type of person who seems reliable. When the police determine that the informant is a prudent person, and he swears to the truth of his information, a reasonable magistrate should be able to issue a warrant on the basis of that information. Here the informant's facts were so specific that, if the informant were to testify at trial, his testimony alone would be sufficient to convict. It seems illogical to say that a magistrate, in issuing a warrant, may not rely on the same information, also given under oath, simply because the affidavit of the investigator was submitted in order to protect the informant who feared for his life should his identity be revealed.

Moreover, the magistrate was not asked to rely upon the informant alone. The affidavit also set forth the background information concerning respondent's reputation over a period of years as a dealer in illicit whiskey and the discovery of the "stash" of whiskey on respondent's property. This information was relevant as furnishing a basis for crediting the specific and timely information received under oath from the informant. The court of appeals has, we submit, misinterpreted and unduly extended the statement in *Spinelli* (393 U.S. at 414) that the fact that Spinelli was known to officers as a gambler was "but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." That is not the situation here. The affiant stated, not only that respondent was known to him for over four years as being a trafficker in illicit liquor, but added "over this period I have received numerous information from all types of persons as to his activities." This is a definite, substantial statement that information had come to the investigator over a period of years from a variety of sources that respondent had been violating the law. Such information is entitled to weight in a determination whether probable cause exists. *Brinegar* v. *United States,* 338 U.S. 160, 171–174; *Jones* v. *United States,* 362 U.S. 257, 271; *Rugendorf* v. *United States,* 376 U.S. 528. In addition, the fact that illegal liquor had actually been found on the premises during that period, while not itself sufficient to constitute probable cause, showed that respondent's reputation was not based on mere gossip, but was sup-

ported by public facts. A police officer, and a magi
trate, aware of that background, could reasonably fi
in it further reason to credit the specific informatio
supplied under oath by the informant.

While the particular offense here involved is n
of great significance, the principle at stake is. A le
in solving a very serious crime may come from a pe
son who has not previously given information. La
enforcement officers ought to be able to act on su
information, even though the informer is unwillin
to reveal his identity, when his information is specif
when he is willing to swear to the truth of his stat
ments, when the officer is willing to swear that h
found th informer credible, and when the inform
tion is co sonant with other facts known to the la
enforcement officers concerning the subject's reput
tion and activities.

CONCLUSIONS

It is respectfully submitted that the petition for
writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JULY 1969.

APPENDIX A

United States Court of Appeals for the Sixth Circuit

No. 18961

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROOSEVELT HUDSON HARRIS, DEFENDANT-APPELLANT

[Filed May 28, 1969, Carl W. Reuss, Clerk]

Decided May 28, 1969

On Appeal from the U.S. District Court for the Eastern District of Kentucky at London

Before WEICK, Chief Judge, O'SULLIVAN and MCCREE, Circuit Judges.

PER CURIAM: Appellant was convicted of possessing non-tax-paid distilled spirits in violation of Section 5205a(2) of the Internal Revenue Code of 1954 and sentenced to two years in prison. The sole question on appeal is the sufficiency of an affidavit used to obtain a search warrant, the execution of which resulted in the discovery of approximately six gallons of whiskey on and about appellant's premises. The District Judge denied a motion to suppress this evidence, rejecting appellant's contention that the affidavit failed to establish probable cause.

The affidavit contained the following recitals: 1) during the past four years, the appellant had a reputation with the affiant of being a trafficker in non-tax-paid whiskey; 2) some time during this four year

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period a constable had located a cache of whiskey in an abandoned house which was under appellant's control; and 3) an informer who the affiant "found * * * to be a prudent person" had told the affiant, as of the date of the affidavit, that he (the informer) "has personal knowledge of and has purchased illicit whiskey from within the residence [of appellant] for a period of more than 2 years, and most recently within the past 2 weeks," and that he knew of another person who purchased illicit whiskey at appellant's residence within the past 2 days.

The Supreme Court has held that an affidavit based on hearsay information may establish the probable cause requisite to the issuance of a search warrant if the issuing magistrate is:

> informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant * * * was 'credible' or his information 'reliable.' *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964). *Accord, Spinelli* v. *United States*, 37 U.S.L.W. 4110 (U.S., Jan. 27, 1969).

This court recently applied the test enunciated in *Aguilar*, and decided that "a declaration in the affidavit that the informant visually observed the fact asserted therein would suffice to establish the probability of its existence, provided there was also a substantial basis for confirming the credibility of the informant." *United States* v. *Kidd*, No. 18465 (6th Cir., Feb. 25, 1969). In *Kidd*, the previous reliability of the informant served to confirm his credibility.

A declaration that the informer has purchased whiskey directly from the suspect at his residence is tantamount to an assertion of visual observation by

the informer. There is, however, nothing in the affidavit used in this case which would provide a "substantial basis for confirming the credibility of the [unidentified] informant." No information is provided which would enable the magistrate to assess his reliability or trustworthiness. The allegation that he is a "prudent person" signifies that he is circumspect in the conduct of his affairs, but reveals nothing about his credibility. Thus, the information received from the informer was not sufficient to establish probable cause for the issuance of the search warrant.

Of course, in *Spinelli, supra,* the Supreme Court held that, "If the tip is found inadequate under *Aguilar,* the other allegations which corroborate the information contained in the hearsay report should then be considered." 37 U.S.L.W. at 4112. We have done this, and we find the other declarations in the affidavit concerning appellant's reputation and the previous experience of a constable insufficient independent corroboration to overcome the inadequacies related to the informer's credibility. The assertion that appellant had a reputation with the affiant of being a trafficker in illegal whiskey would not, standing alone, establish probable cause. And the Supreme Court has held that this type of statement may not be used "to give additional weight to allegations that would otherwise be insufficient." *Spinelli* v. *United States,* 37 U.S.L.W. at 4113. The statement concerning the constable's discovery of a cache of whiskey gives no indication when, during the previous four years, this episode occurred. Reliance on this assertion would violate the principle that "probable cause must be determined as of the time the warrant is issued." *Schoeneman* v. *United States,* 317 F.2d 173, 177 (D.C. Cir. 1963).

Since the affidavit was insufficient to establish probable cause, issuance of the warrant was improper and the evidence obtained should have been suppressed. The judgment of the District Court is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed.

APPENDIX B

United States Court of Appeals for the Sixth Circuit

[Filed May 28, 1969, Carl W. Reuss, Clerk]

No. 18961

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ROOSEVELT HUDSON HARRIS, DEFENDANT-APPELLANT

Before: WEICK, Chief Judge, O'SULLIVAN and MCCREE, Circuit Judges.

Judgment

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was submitted on briefs without oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

No costs awarded. Rule 39(b).
Entered by order of the Court.

CARL W. REUSS,
Clerk.

Issued as Mandate:
June 18, 1969
COSTS: NONE
Filing fee_____ $____
Printing _____ $____
Total ____ $____

A True Copy.
Attest:
CARL L. REUSS,
Clerk.

APPENDIX C

Eastern District of Kentucky, Affidavit for Search Warrant

Form A. O. 106

United States District Court for the Eastern District of Kentucky

June 20, 1967, Davis T. McGarvey, clerk, U.S. district court

Commissioner's Docket No. 5

Case No. 180

UNITED STATES OF AMERICA

vs.

ROOSEVELT HARRIS

AFFIDAVIT FOR SEARCH WARRANT

Before: KELLY CLORE, Commissioner, Pineville, Kentucky.

The undersigned being duly sworn deposes and says:

That he (has reason to believe)[1] that (on the premises known as) The Roosevelt Harris residence, a 5 or 6 room green sided frame dwelling, and including

[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

a red sided outbuilding located about 10 yards from the residence and known as the "Dance Hall", and another outbuilding, and a number of vehicles, the buildings containing basements and attics, and all other appurtenances, these buildings being located at 310 Dansbury Avenue, the 2nd dwelling on the left of Dansbury when approached from North 15th Street, in the City of Middlesboro, Bell County, Eastern District of Kentucky, there is now being concealed certain property, namely Non taxpaid distilled spirits in containers not bearing internal revenue stamps as required by law, which are fit and intended for use in violation of title 26, USC as amended, section 5604 (a)(1).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: Roosevelt Harris has had a reputation with me for over 4 years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandonded house under Harris' control during this period of time. This date, I have received information from a person who fears for their life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consummed by purchasers in the outbuilding known as and utilized

as the "dance hall", and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons.

RUSSELL R. BAUER,
Special Investigator, A&TTD.

Sworn to before me, and subscribed in my presence, 17th of June, 1967.

KELLY CLORE,
United States Commissioner.

U.S. GOVERNMENT PRINTING OFFICE: 1969

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CITATIONS

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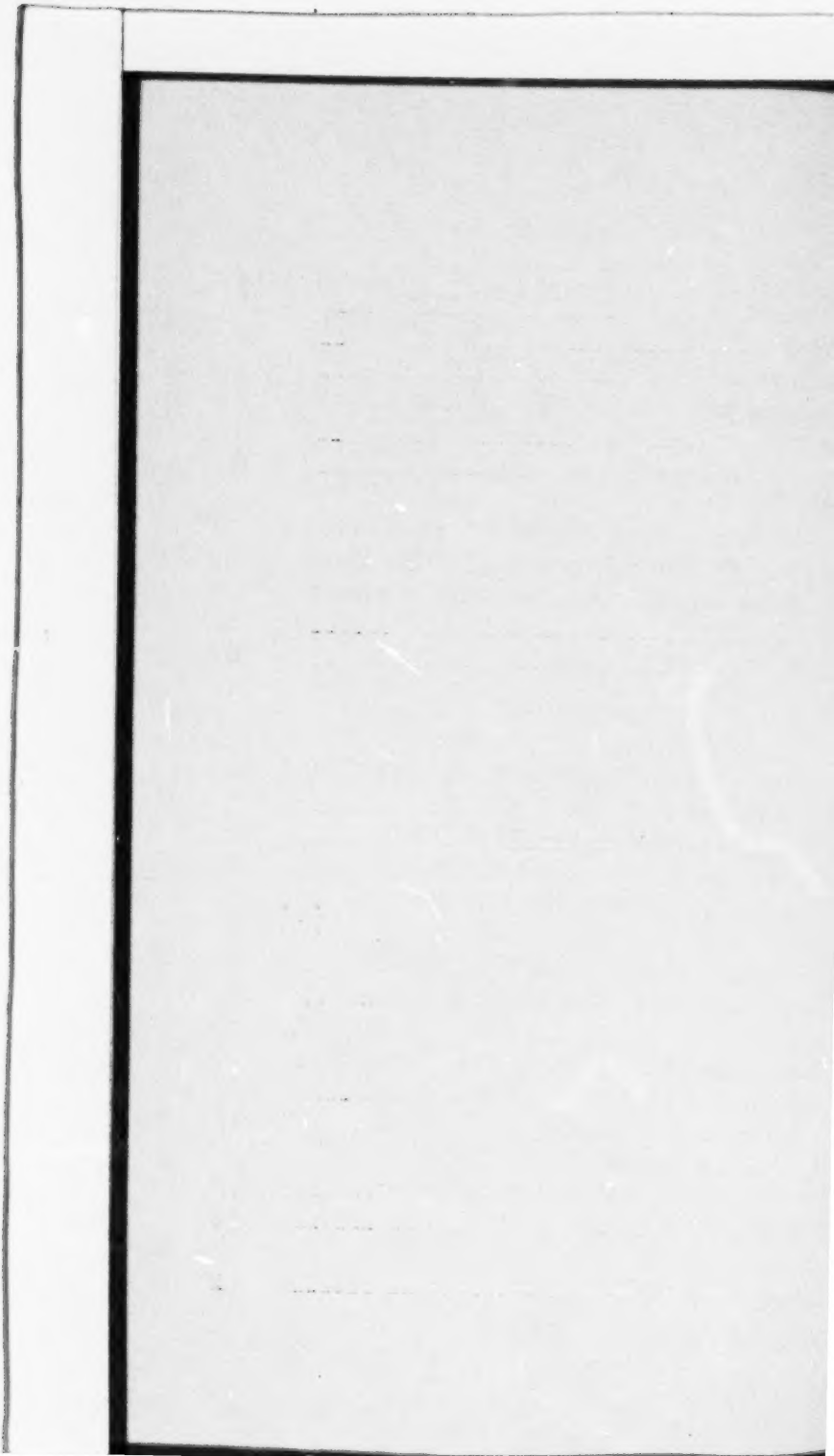

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 388

UNITED STATES OF AMERICA, PETITIONER

v.

ROOSEVELT HUDSON HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 24–26) is reported at 412 F. 2d 796.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1969. By order of Mr. Justice Stewart, dated June 26, 1969, the time for filing a petition for a writ of certiorari was extended to and including July 26, 1969. The petition for a writ of certiorari was filed on July 25, 1969, and granted on February 24, 1970. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commissioner could reasonably find, on the basis of the affidavit submitted, that there was probable cause to issue a search warrant.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located.
>
> (b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property
>
> * * * * *
>
> (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; * * *
>
> * * * * *
>
> (c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the

judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. * * *

* * * * *

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that * * * (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued * * *.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, respondent was convicted of possessing nontax paid liquor, in violation of 26 U.S.C. 5205(a)(2), and sentenced to imprisonment for two years. The court of appeals reversed on the ground that the affidavit supporting a search warrant, the execution of which resulted in the discovery of some illicit liquor, was insufficient to establish probable cause.

The affidavit was made by Russell R. Bauer, a special investigator for the Alcohol and Tobacco Tax Division of the Internal Revenue Service. The affiant stated that he had reason to believe that distilled

spirits in containers not bearing internal revenue stamps as required by law were being concealed in a described residence and nearby buildings belonging to respondent. The grounds for such belief were set forth in the following language:

> Roosevelt Harris has had a reputation with me for over 4 years as being a trafficker of non-taxpaid distilled spirits, and over this period I have received numerous information from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abondoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in the outbuilding known as and utilized as the "dance hall," and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons.

In his motion to suppress, respondent raised four claims: that the affidavit supporting the search warrant was based upon hearsay; that the warrant and

affidavit did not properly describe the premises to be searched; that the illicit liquor found in the execution of the warrant was located on the premises of an adjoining neighbor;[1] and that the affidavit failed to state the reputation of the unnamed informant. At a hearing on the motion, agent Bauer, the affiant, testified that on June 17, 1967, he, another agent and Constable Johnson, after obtaining the warrant, conducted a search of respondent's residence. Inside the house they discovered a half-pint bottle filled with nontaxpaid liquor and a gallon jug partially filled (A. 13). Outside the house they followed a path running through a heavily weeded vacant lot. At two different spots within the open area, approximately one hundred feet from respondent's residence, agent Bauer discovered sacks of jugs, containing a total of six gallons of illicit whiskey (A. 14). After this testimony, respondent's motion was overruled.

On appeal respondent focused his attack upon the affidavit supporting the search warrant, and argued that the information contained therein was insufficient to justify issuance of a warrant. Respondent relied upon *Aguilar* v. *Texas,* 378 U.S. 108, which held that, where an affidavit is based upon hearsay information, the issuing magistrate must be informed of some of the underlying circumstances from which the informant based his allegations, and some of the underlying circumstances from which the law enforcement officer-affiant concluded that the informant was credible or his information reliable. While the appeal

[1] Following the testimony at the hearing on respondent's motion to suppress, defense counsel withdrew this ground (A. 19–20).

was pending, this Court decided in *Spinelli* v. *United States,* 393 U.S. 410, that if the showing of credibility or reliability is inadequate under the test suggested in *Aguilar,* an examination should be made of the other allegations which corroborate the information contained in the hearsay report to determine whether they, by their nature, provide an assurance of the informant's credibility or the reliability of his information. In its decision reversing respondent's conviction, the court of appeals, purporting to apply the standards of *Aguilar* and *Spinelli,* concluded that the affidavit failed to contain sufficient information to enable a magistrate to assess the informant's reliability or trustworthiness (A. 24–26).

SUMMARY

In *Aguilar* v. *Texas,* 378 U.S. 108, this Court recognized that a valid affidavit in support of a request for a search warrant could be based on hearsay information supplied by an informant. However, the Court held invalid the affidavit under consideration in that case because it failed to set forth any of the "underlying circumstances" that would enable the magistrate to judge independently the accuracy of the informant's conclusions, and because the affidavit did not substantiate the assertion that the informant was "credible" or his information "reliable." Although *Aguilar* made it clear that affidavits which merely alleged the skeletal facts stated by the informant and an unsubstantiated opinion of the informant's reliability would no longer be held to satisfy the requirements of the Fourth Amendment, the decision

did not alter the overriding principle that affidavits are to be read "in a commonsense way rather than technically." *United States* v. *Ventresca,* 380 U.S. 102, 109. Subsequent decisions of this Court have confirmed the Court's approval of a commonsense approach to search warrant applications. For example, in *Spinelli* v. *United States,* 393 U.S. 410, the Court decided that if the informant's tip is inadequate by itself to establish probable cause under the standard suggested in *Aguilar,* the magistrate should examine "the other allegations which corroborate the information contained in the hearsay report."

We believe that the instant case is an example of the difficulties which arise when lower courts attempt to apply the guidelines suggested in *Aguilar* and *Spinelli* in an excessively rigid and technical manner. Although the lower court acknowledged that the affidavit established unambiguously that the informant based his assertions on personal knowledge rather than on hearsay, the court did not recognize the extent to which this critical factor distinguishes the instant case from *Aguilar.* Applying the second criterion suggested by *Aguilar,* that the affidavit provide information as to the reliability of the informant, the court ignored the explicit detail related by the informant and erroneously discounted the affiant's assertion that he had interviewed the informant and found him to be a "prudent person."

We submit that the lower court opinion, if upheld, will leave little room for establishing the credibility of an informant who has not previousy supplied the police with information, and will also make it ex-

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tremely difficult to utilize information from an informant who wishes to remain anonymous. We do not believe that a commonsense approach to the review of search warrants requires such a result.

Finally, even under the technical reading of *Aguilar* adopted by the lower court, the affidavit in this case should have been upheld on the basis of "the other allegations which corroborate the information contained in the hearsay report", as suggested in *Spinelli*, 393 U.S. at 415.

ARGUMENT

THE AFFIDAVIT PRESENTED SUFFICIENT FACTS TO SUPPORT THE COMMISSIONER'S FINDING THAT THERE WAS PROBABLE CAUSE TO ISSUE A SEARCH WARRANT

In *Aguilar* v. *Texas*, 378 U.S. 108, this Court held invalid a search warrant issued upon an affidavit of police officers who swore only that they had "received reliable information from a credible person and do believe" that narcotics were being illegally stored on the described premises. While recognizing that the constitutional requirement of probable cause can be satisfied by hearsay information, the Court ruled against the affidavit in question because it did not set forth any of the "underlying circumstances" that would enable the magistrate to judge independently the accuracy of the informant's conclusion as to the location of the narcotics; nor did the affidavit attempt to support its assertion that the informant was "credible" or his information "reliable".

The Court in *Aguilar* did not intend to set forth rigid, technical rules for testing an affidavit; the opinion merely discussed some of the ways in which the

allegations made in an affidavit based upon hearsay could be substantiated so as to meet the constitutional standard of probable cause. Although *Aguilar* made it clear that affidavits which merely alleged the skeletal facts stated by the informant and an unsubstantiated opinion of the informant's reliability would no longer be held to satisfy the requirements of the Fourth Amendment, the decision did not alter the overriding principle that affidavits are to be read "in a commonsense way rather than technically." *United States* v. *Ventresca,* 380 U.S. 102, 109. Indeed, after *Aguilar,* this Court continued to state the applicable test in broad, commonsense language. For example, in *Berger* v. *New York,* 388 U.S. 41, 55, the Court reiterated that the probable cause which will support a search under the Fourth Amendment exists where "the facts and circumstances within the (officer's) knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed."

Last Term, in *Spinelli* v. *United States,* 393 U.S. 410, the Court had before it an affidavit which, like the affidavit in *Aguilar,* failed to support the bald assertion that the informant was reliable, and which, in the Court's view, did not "contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation." 393 U.S. at 416. Finding the informant's tip inadequate by itself to establish probable cause, the Court proceeded to examine "the other

allegations which corroborate the information contained in the hearsay report," in order to determine whether these allegations lent enough additional weight to the tip so that the affidavit, considered as a whole, established probable cause. On balance, the majority in *Spinelli* found the corroborating allegations to be of insufficient probative value, and held the affidavit invalid. Mr. Justice Harlan, writing for the Court, made it clear that the *Spinelli* decision depended on its own facts, and that the commonsense approach to applications for search warrants had not been altered (393 U.S. at 419):

> In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing of criminal activity is the standard of probable cause, *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray* v. *Illinois*, 386 U.S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones* v. *United States*, 362 U.S. 257, 270–271 (1960). * * *

The instant case, we believe, is an example of the difficulties which arise when lower courts attempt to apply the guidelines suggested in *Aguilar* and *Spinelli* in a rigid, technical manner that loses sight of the commonsense nature of the relevant inquiry. The

court below recognized that the affidavit was distinguishable from the document held invalid in *Aguilar* in that it set forth the underlying circumstances on which the informer based his conclusions. Indeed, this crucial distinction is striking. The affidavit in the instant case related that the informant had made a "sworn verbal statement" that he had himself purchased illicit whiskey from the petitioner at the residence described, "for a period of more than 2 years, and most recently within the past 2 weeks." The informant also stated that he had "personal knowledge" of at least one other person who had purchased illicit whiskey from the petitioner in the past two weeks, and that he had personally seen petitioner "on numerous occasions" moving about from his residence to an outbuilding on the premises to obtain illicit whiskey for customers. Therefore, as the court below acknowledged, the critical problem in *Aguilar,* which was the absence of any indication that the informant had personal knowledge of the facts alleged in the affidavit, is not present in this case, for here there is unambiguous evidence that the informant had personally observed the presence of the illegal goods in the location to be searched, over a period of several years and in the last two weeks.

In spite of its recognition that the affidavit supplied ample "underlying circumstances" to support the informant's allegations, the court below held that the affidavit failed to meet the standard set forth in *Aguilar* because, in its view, "No information is provided which would enable the magistrate to assess [the informer's] reliability or trustworthiness" (A. 25). The

court appears to have ignored the fact that in *Aguilar* and other cases which have taken note of the absence of evidence bearing directly on the reliability of the informant and his information, it has not been clear from the affidavit that the informant was claiming personal knowledge of the events described; indeed, the Court in *Aguilar* stressed the fact that the affidavit did not reveal whether the informant was speaking from personal knowledge or from hearsay; had the affidavit, as here, unambiguously revealed that the informer was claiming personal knowledge of his assertions, the Court might well have relaxed its requirement that the affidavit present other direct evidence of the reliability of the informer and his information.

But even if we assume that the reliability-of-the-informer test suggested in *Aguilar* is fully relevant here, it is difficult to understand on what basis the court could conclude that the affidavit provided "[n]o information" on which the magistrate could evaluate the informer's reliability, unless *Aguilar* is deemed to establish a rigid requirement that the affiant set forth specific facts about the informant himself in order to establish the credibility of the information. Here explicit detail was provided in the affidavit—for example, the informant recited the approximate distance between the respondent's residence and the outbuilding where he kept his stock of illicit whiskey—as an indication that the information was reliable. As this Court pointed out in *Spinelli*, "A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his infor-

mation in a reliable way." 393 U.S. at 417. See *Draper* v. *United States*, 358 U.S. 307.[2]

In fact, the court below did not even credit the affiant's assertion that he had "interviewed" the informant and found him to be a "prudent person." The court interpreted this statement by the affiant as revealing nothing about the informer's credibility, but as indicating only that the informer was "circumspect in the conduct of his affairs" (A. 25). In our view, the court's comment here reflects the type of unrealistic and "hypertechnical" interpretation that has no place in the review of search warrant affidavits. *United States* v. *Ventresca*, 380 U.S. 102, 108–109. In the context in which it is found in this affidavit, the term "prudent" was obviously not meant to describe the informant merely as circumspect or cautious, but rather as one upon whom the agent could rely to furnish credible and reliable information.

Indeed, it is this aspect of the lower court's opinion which most concerns the government, and which occasioned our request for certiorari in this case. the past, this Court has recognized that an informant's reliability may be established by showing that he has previously given information that proved reliable. See *McCray* v. *Illinois*, 386 U.S. 300. We believe, however, that there are circumstances in which a magistrate should be allowed to issue a warrant on the basis of information supplied by a person who has never be-

[2] The court below should also have taken note, we submit, of the fact that the informant gave his statement to the affiant under oath. See *United States* v. *Stallings*, 413 F.2d 200 (C.A. 7), certiorari denied, 396 U.S. 972.

fore provided information to the police. In fact, the person who supplies information to the police on only one occasion will often be a more reliable type of individual than one who supplies such information on a regular basis. The latter is likely to be someone who is himself involved in criminal activity or is, at least, someone who enjoys the confidence of criminals. Cf. *Jaben* v. *United States,* 381 U.S. 214, 224. On the other hand, a law-abiding citizen will rarely provide the police with information concerning a crime on more than one occasion. It seems unreasonable to say that a magistrate can rely entirely on information from the former but can rely on information from the latter only if it is corroborated by independent investigation.

We are also concerned that the decision below will make it difficult to establish probable cause on the basis of information received from anonymous informers. Frequently, circumstances will require that the identity of an informer be kept secret, either because he is an undercover agent or because, as here, the informer fears that disclosure of his identity will result in physical danger to himself or his family. Law enforcement officers ought to be able to act on information, even though the informer is unwilling to reveal his identity, when his information is specific, when he is willing to swear to the truth of his statements, when the officer is willing to swear that he found the informer credible, and when the information is consistent with other facts known to the law enforcement officers concerning the subject's reputation and activities.

This case presents, we submit, a clear example of the type of situation in which there is a sufficient basis for crediting the informant's assertions to permit the magistrate to rely on the anonymous informant's statements even though he has not previously provided information. Unfortunately, the narrow view taken by the lower court, which entirely discounted the affiant's opinion, based on an interview with the informant, that the informant appeared to be a reliable source of information, makes it very difficult to establish the credibility of an informant who has not previously supplied information to the police or who desires to remain anonymous. We submit that the court below should have given substantial weight to the officer's assertion that the affiant was a "prudent person," particularly in light of the explicit detail given by the informant and the personal nature of the knowledge which he claimed.

Finally, even if the lower court's narrow reading of *Aguilar* is upheld and the informer's tip is deemed to fall short of the standard suggested in that case, the affidavit should have been upheld on the basis of "the other allegations which corroborate the information contained in the hearsay report." *Spinelli, supra,* 393 U.S. at 415. The affidavit alleged that the police had known respondent for years as a dealer in illicit whiskey, and that the affiant had "received numerous information from all types of persons as to his activities." The police had located "a sizable stash of illicit whiskey in an abandoned house under Harris' control during this period of time." Thus, unlike the situation in *Spinelli,* where the Court char-

acterized the assertion that Spinelli was known to officers as a gambler as a "bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision," 393 U.S. at 414, the affiant here substantiated his assertions about respondent's general reputation with claims of "numerous" sources of information as to respondent's illegal activities, and with the citation of a specific instance in which illegal merchandise had been found on respondent's property. Although these allegations alone would not have established probable cause, they added substantial credibility to the informant's tip, and should not have been discounted by the court below. *Brinegar* v. *United States,* 338 U.S. 160, 171-174; *Rugendorf* v. *United States,* 376 U.S. 528.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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MAY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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OTHER AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 30.

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

ROOSEVELT HUDSON HARRIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc., respectfully moves this Court for permission to file a brief as amicus curiae in support of the United States in the case of the *United States* v. *Roosevelt Hudson Harris,* No. 30, October, 1970 Term. We have been advised by the Clerk of this Court that the original defense attorney in this case cannot be located and that there is some question as to whether he will be continued in the case. We have secured the permission of the Solicitor General of the United States to file and a copy of a letter to this effect has been filed with the clerk. As the defense attorney is unavailable, we are moving the Court directly for permission to file.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT AS AMICUS CURIAE.

INTEREST OF THE AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. AELE has received a tax exempt ruling from the Internal Revenue Service as an educational corporation. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

AELE also has such powers as are now or may hereinafter be granted by the General Not For Profit Corporation Act of the State of Illinois.

AELE has appeared in this Court as *Amicus Curiae* in the Cases of *Terry* v. *Ohio,* 392 U. S. 1, and *Hill* v. *California,* No. 730, October 1970 term, re-argued October 21, 1970. We have also appeared as *Amicus Curiae* in the United States Court of Appeals for the Tenth Circuit in *Metros et al.* v. *District Court,* No. 432-70, 1970.

The interest of AELE is to represent the concern of the average citizen with the problems of crime and with police

effectiveness. We seek to articulate to the Court the very real problems that confront law enforcement in this country, in order that the Court may weigh such problems in deciding cases which will have a vital impact on police effectiveness.

As the Report of the President's Commission on Law Enforcement and Administration of Justice (p. 94) has pointed out:

> ". . . many . . . decisions [are] made without the needs of law enforcement, and the police policies that are designed to meet those needs, being effectively presented to the court. If judges are to balance accurately law enforcement needs and human rights, *the former must be articulated.* They seldom are. Few legislatures and police administrators have defined in detail how and under what conditions certain police practices are to be used. As a result, the courts often must rely on intuition and common sense in judging what kinds of police action are reasonable or necessary, even though their decisions about the actions of one police officer can restrict police activity in the entire nation (emphasis added).

The articulation called for by the President's Commission is what we seek to accomplish. Further, as *amicus curiae* we are in a position to give a voice to what we believe are the views of the law enforcement profession as a whole, unrestricted by the needs or desires to uphold a particular decision or to sustain a particular arrest or search.

The instant case is, we believe, a case of extreme significance to the effectiveness of law enforcement as a whole. Search and seizure cases are, so far as the police are concerned, perhaps the most important class of cases this court considers. This Court's prior decisions in the area of confessions *Miranda* v. *Arizona,* 384 U. S. 436; *Orozco* v. *Texas,* 394 U. S. 324 leave no doubts as to the

Court's preference for the use of physical evidence against an accused rather than evidence elicited from the accused himself. Search and seizure is, or course, the means by which the police acquire physical evidence.

The issue presented in the instant case—the interpretation of affidavits for search warrants—is vital to effective search and seizure procedures. In addition, this is the first significant case dealing with search warrants that this Court has agreed to review since *Chimel* v. *California*, 395 U. S. 752, greatly expanded the requirement of the use of search warrants by the police. We have empirical data to present to the Court as to the impact of *Chimel* on law enforcement which we believe will aid the Court in this case, and as in our *amicus curiae* briefs in *Terry* v. *Ohio, supra,* and *Hill* v. *California, supra,* we will present to the Court the police position in a practical rather than a theoretical context.

Thus, because of our concern to represent the law abiding segment of society through support for *proper, non-abusive* law enforcement—and because of the significance of the instant case—we believe that we have a real interest in appearing as *amicus curiae.*

ARGUMENT.

1. The Importance of This Case to the Police.

This case has a singular importance for the police of this country because it is the first significant search warrant case that this court has agreed to review since its decision in *Chimel* v. *California*, 395 U. S. 752 (June, 1969). As this Court is aware, *Chimel* drastically changed the law of search and seizure insofar as searches of premises are concerned. Whereas prior to *Chimel* the general rule was that *all* of a given premises under an arrestee's control could be lawfully searched incident to his arrest on such premises (*United States* v. *Rabinowitz*, 339 U. S. 56), now the scope of such searches must be confined to the "immediate area" of the arrestee. The net effect of the *Chimel* decision on working police officers is that they must procure search warrants in by far the greatest majority of cases. The greatly expanded search warrant system mandated by *Chimel* gives to this case a special significance simply because it *is* a search warrant case.[1]

We do not wish to belabor the point that *Chimel* has had a startling effect on police procedures;[2] however, AELE

1. Mr. Justice Harlan noted this point in his concurring opinion in *Chimel*. After pointing out that *Mapp* v. *Ohio*, 367 U. S. 643, and *Ker* v. *California*, 374 U. S. 23, require that changes in Fourth Amendment law enunciated by this court must be followed by state officers, nation-wide, he stated:

> We simply do not know the extent to which cities and towns across the nation are prepared to administer the greatly expanded warrant system which will be required by to-day's decision. . . . (395 U. S. 752 at 769).

2. Examples of some of the other problems raised for the police by *Chimel* were presented to this Court in the amicus curiae brief filed by Americans for Effective Law Enforcement et al. in the case of *Hill* v. *California*, No. 730 on reargument before this Court October term 1970.

would like to offer to the Court two brief examples of the impact of that case on local police departments.

1. In September of 1969 the Los Angeles Police Department conducted a study of the effects of *Chimel* in that city. Search and seizure cases in March of 1969, three months prior to the *Chimel* decision, were reviewed. This study indicated that there were 436 incidents in March that would have required different police procedures had *Chimel* then been in effect. Projected on an annual basis this figure would approximate 5,200 such incidents in Los Angeles alone. The same study estimated that the *Chimel* decision would cost the Los Angeles Police Department an additional 86,000 man hours annually at a monetary cost of $464,000 per year.[3]

2. The following figures from the files of the Denver District Court show the number of search warrants secured by the Denver Police during six month periods:

January-June 1969 (just prior to *Chimel*)	162
June-December 1969 (just after *Chimel*)	259
January-June 1970	383

The increased search warrant activity after *Chimel* is obvious, in the first six month period of 1970 the number of search warrants more than doubled over the same period a year before.

These figures from Los Angeles and Denver clearly portray the extent to which *Chimel* has increased the necessity for police use of search warrants. We urge the Court to consider the instant case, which deals with the question

3. This study is contained in a Los Angeles Police Department report dated September 24, 1969 from Captain W. G. Brown, Commander, Management Services Division, to Assistant Chief Daryl F. Gates, Director, Administrative Services; Subject: Man Hour Cost Study re: *Chimel* decision. Copies of this report were lodged with this Court on October 21, 1970 by Mr. Ronald M. George, Assistant Attorney General of the State of California when he re-argued *Hill* v. *California* (No. 730 October 1970 Term), before the Court.

of interpretation of search warrants, in the context of *Chimel's* command to the police that warrants must be used in the vast majority of cases.

2. The Question of Standards for Interpretation of Search Warrants: Common Sense and Realistic versus Hypertechnical and Rigid.

The instant case deals with the basic question of how search warrants are to be interpreted by the lower courts.[4] As was pointed out above, the importance of the answer to this question has been magnified by *Chimel's* requirement of greatly increased use of search warrants by the police. The instant case presents the interpretation question in sharp focus. The facts are not in dispute and have been set out fully by the United States in its brief, at pages 3 through 6, therefore only the briefest re-capitulation is needed here.

The question presented involves the interpretation of an affidavit for a search warrant, the execution of which resulted in the discovery of illicit liquor. Respondent's motion to suppress the search warrant as insufficient to establish probable cause was denied by the trial court[5] and he was convicted of possessing non-taxpaid liquor. On appeal, the United States Court of Appeals for the Sixth Circuit reversed, holding that the affidavit for search warrant was insufficient to establish probable cause, 412 F. 2d 796. The Government petitioned for a writ of certiorari which was granted by this Court on February 24, 1970.

The affidavit for search warrant in question, filed by a federal Alcohol and Tobacco Tax Special Investigator, was

4. For the sake of brevity we will use the term "search warrant" to apply to the warrant itself as well as the underlying affidavit.

5. United States District Court for the Eastern District of Kentucky. The testimony in the motion to suppress may be found in the appendix to the brief of the United States in the instant case.

based on respondent Harris' reputation with the affiant for being a moonshine trafficker; information received by the affiant about H[illegible]s' activities; location of a stash of illicit liquor on premises under Harris' control on an earlier date; and on a sworn statement from an unnamed informant who had recently purchased liquor from Harris. This sworn statement described Harris' whiskey selling operation in detail and the affiant stated that he had interviewed the informant and found the informant to be a prudent person.[6]

The United States in its brief, pages 8 through 16, argues that the affidavit for search warrant in this case did, in fact, establish probable cause when viewed in a common sense manner, and the United States further contends that the lower court interpreted the affidavit in a "rigid, technical manner that loses sight of the relevant inquiry" (Br. page 10), AELE will not reiterate these arguments except to express our complete agreement with and support for the Government's position. We will turn, rather, to the more fundamental question, vital to law enforcement, of the standards that should be applied in the interpretation of search warrants by reviewing courts. We submit that this case presents this Court with an opportunity to lay down the basic interpretative rule for lower courts to follow and that such a rule should be characterized by common sense and realism.

Surely the prior pronouncements of this Court make it clear that a common sense approach is preferable. *United States* v. *Ventresca*, 380 U. S. 102, stands firmly for the principle that:

> . . . affidavits for search warrants . . . must be tested by and interpreted by magistrates and courts in a common sense and realistic fashion (p. 108).

6. The affidavit is reprinted in the appendix to the brief of the United States in the instant case.

This principle was most recently reaffirmed by this Court in *Spinelli* v. *United States*, 393 U. S. 410 (1969). In that case an affidavit for search warrant was found insufficient, but the *principle* of common sense interpretation of *Ventresca, supra*, was explicity affirmed. 393 U. S. 410 at 419.

Further, in the related area of probable cause to arrest,[7] this Court has never retreated from the flexible, common sense approach taken in *Draper* v. *United States*, 358 U. S. 307, in which detailed information provided by an informant, corroborated by the officers' observations was held sufficient to justify an arrest and search (See also *United States* v. *Mitchell*, CA 8, 425 F. 2d 1353 (4/14/70), in which then Judge Blackmun applied *Draper* to sustain an arrest and search).

The common sense approach to search warrants can be found emphasized in the Federal Circuits time and again. For example, the Second Circuit in *United States* v. *Dunnings*, 425 F. 2d 836 (11/17/69):

> But here the admonition in *United States* v. *Ventresca*, 380 U. S. 102, 108; (1965), against reading such affidavits with undue technicality comes into play (p. 839).

Similarly the Third Circuit in *Kislin* v. *New Jersey*, 429 F. 2d 950, (7/9/70) sustained a "borderline" search warrant and applied a realistic approach emphasizing the often-announced rule of the preference for search warrants.

The Eighth Circuit in *McCreary* v. *Sigler*, 406 F. 2d 1264 cert. den. 396 U. S. 829 (2/18/69) summed up the interpretative rule:

> In dealing with the sufficiency of affidavits (1) only a probability of criminal conduct need be shown, (2) standards less rigorous than rules of evidence determine sufficiency, (3) common sense controls, and (4) great deference should be shown by the courts to a magistrates determination of probable cause (p. 1268).

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7. In *Spinelli, supra*, Mr. Justice Harlan pointed out that the analysis concerning probable cause to arrest and probable cause for a search warrant is basically the same. 393 U. S. 410, ft. 5.

Thus the weight of judicial authority is clearly on the side of realistic review of search warrants. In addition, we urge the Court to consider the question from the point of view of the police officers themselves. In *Gonzales* v. *Beto*, 425 F. 2d 963 (5/6/70) the United States Court of Appeals for the Fifth Circuit sustained two search warrants against the restrictive interpretation imposed by the district courts upon the supporting affidavits. In so doing, the Court gave a surprisingly accurate description of the practical side of police work in securing warrants:

> It is not the intent of the *Aguilar* and *Spinelli* decisions to make it difficult for a policeman to get a warrant if in fact he has probable cause. On the contrary, the cases contemplate that an affiant with some basic understanding of the law can get a warrant if he simply sits down and explains why (p. 970).

Thus, the average police officer, in attempting to draft an affidavit for search warrant, is expected to "simply sit down and explain why" he believes he has probable cause. Mr. Justice Clark has characterized the policeman as ". . . anxious to obey the rules that circumscribe his conduct [in the search and seizure area] . . ." *Chapman* v. *United States*, 316 U. S. 610 at 622 (dissenting opinion). This characterization is accurate; the policeman *does* want to obey the rules, but the policeman is not a lawyer in most instances, and as was pointed out in *United States* v. *Ventresca, supra:*

> Technical requirements of elaborate specificity once exacted under common law pleadings have no place in this area. 380 U. S. 102 at 108.

The instant case is an excellent example of this principle. The Alcohol Tax Investigator felt that he had probable cause and he attempted to explain why. The affidavit in the instant case is no literary masterpiece nor is it a stunning piece of legal drafting—but it is not supposed to be.

We submit, and we urge the Court to hold, that when it is viewed in a common sense and realistic fashion, the affidavit for search warrant in the instant case tells a coherent story which would cause a reasonable man to believe that whiskey was located on Roosevelt Harris' property; that is, the affidavit establishes probable cause.

We state here, emphatically, that we do not contend that just because an officer takes the time to draft an affidavit appellate courts should "rubber stamp" his action. Probable cause remains the standard for search warrants. Our point is based on the *manner* of interpreting the warrant to ascertain if it states probable cause. We agree with the government that in this case the lower court literally picked the affidavit to pieces with a rigidity of interpretation that was not warranted. We urge this Court to reverse this interpretation by the lower court and to uphold the affidavit as establishing probable cause. In so doing the Court would be affirming the vital principle that common sense, flexible, realistic, interpretation of search warrants is, and should be, the rule.

3. The Informant Issue: The "Good Citizen" or One Time Informant.

There is a final isue of critical importance to the police in this case, namely: whether they may lawfully act on information from an informant whose credibility has been established by means other than "prior reliability". The United States has dealt with this issue in its brief at pages 13 and 14. The United States argues that there are circumstances in which a magistrate should be able to issue a warrant on the basis of information from a person who has never given information to the police before and who does not want his identity revealed, usually from motives of fear for the safety of himself or his family. We agree with this contention.

McCray v. *Illinois*, 386 U. S. 300, makes it clear that an informant's reliability can be shown by the fact that he has given information in the past that has proved to be reliable; but this should not constitute the *only* basis for establishing reliability. The United States (Br. page 14) sums up this point:

> Law enforcement officers ought to be able to act on information, even though the informer is unwilling to reveal his identity, when his information is specific, when he is willing to swear that he found the informer credible, and when the information is consistent with other facts known to law enforcement officers concerning the subject's reputation and activities.

This is basically a "rule of reason" in search warrant interpretation such as is urged upon this Court in the second section of our argument. Our purpose in this section is to present to the Court some practical situations[8] often encountered by the police in which the "one time" or "good citizen" informant clearly falls within the qualifications for reliability referred to in the Government's brief:

(a) *Actual case*—Charlotte, N. C. Police Department.

A grocery store had been burglarized and the cash register stolen. The informant, an 18 year old employee of the store, who had never furnished information to the police before, saw the stolen cash register in a house in the neighborhood and heard the occupant boast of having stolen it. The informant did not wish to be identified as he was afraid of reprisals.

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8. The first example is an actual case now pending in North Carolina which was sent to the writer by Mr. G. Patrick Hunter, Police Attorney for the Charlotte, North Carolina Police Department. The other examples are "hypothetical" in that no one particular case is described; however, they are common occurrences in police work and are based on 10 years of personal police experience of the writer of this brief (including three years as a Police Legal Advisor) and discussions of this matter with other police officials. The "hypothetical" situations are not far-fetched, but rather are everyday situations that have arisen and could arise in any police jurisdiction.

A search warrant issued in this case. In order to establish the reliability of the informant the police swore to the following facts:

(1) the police interviewed the informant and were of the opinion that he was reliable, that he had observed the cash register in the suspect's home and that he could identify it;

(2) the police interviewed the informant's employer and his neighbors who stated that he was a reliable, accurate and honest individual;

(3) the informant had no police record.

When the warrant was executed the cash register was found.

(b) *"One-time" Informant Situations:*

Maids—In many cases maids in motels and hotels will, in the course of their cleaning duties, come across stolen property or contraband. They often report these findings to the police but in many cases they do not wish to be identified, again for fear of reprisals.

Landlords and custodians—These individuals are somewhat analogous to the maids in that their duties take them lawfully into other premises, yet they may never have given information to the police before. On many occasions the police receive reports from such individuals that stolen property, narcotics or weapons have been seen by them in apartments, rooms, etc. Again, the incentive not to be identified is present, yet there may be every reason to believe that they are telling the truth.

Parents—Parents, these days, are particularly concerned with the use of narcotics by their children and are generally on the alert for conversations about drugs that their children may engage in. In a Colorado situation, a mother overheard her son and a friend discussing in detail plans for a "pot party" at the friend's house that night. She went to the police with this information; yet, as she had not given information before,

she did not fit the classic "reliable informant" pattern. Her "credibility", it would surely seem, would be established under these facts.

These are only a few examples of situations in which the "one time" or "good citizen" informant furnishes information to the police that has all of the earmarks of being worthy of belief. Further, in these cases, the informant has no reason to lie. We submit that, where the officers can swear that they believe such persons to be credible, where there is specific and detailed information,[9] where other facts known to the officers are consistent with the information, and where the informant has sworn to the truth of the information—this "totality" of circumstances, viewed in a common sense manner, should surely constitute probable cause for a search warrant. Such is the situation in the instant case and we again urge the Court to uphold the search warrant in that case.

Conclusion.

The interest of Americans for Effective Law Enforcement in filing this brief as *amicus curiae* has been to speak out for effective law enforcement in a case which we feel is of major importance. As the first search warrant case since *Chimel* v. *California, supra,* was decided the instant case is important; as a case in which interpretative rules for search warrants it is important; and, on the "good citizen" or "one time" informant issue it is important.

We urge the Court to reverse the Court of Appeals for the Sixth Circuit and to sustain the validity of the affidavit

9. In a recent case dealing with automobile searches, *Chambers* v. *Maroney,* ..... U. S. ....., 90 S. Ct. 1975 (1970), this court sustained an arrest and search based on the detailed description of eyewitnesses even though the witnesses had never given information to the police before. Is not a motel maid who sees contraband in plain view, in a room where she has a right to be, an "eyewitness" to the crime of possession of that contraband?

for search warrant in the instant case. We submit that this affidavit *does* in fact establish probable cause when viewed in the common sense realistic manner that this Court and lower courts have often stated should be the interpretative rule.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 30

UNITED STATES OF AMERICA,

Petitioner,

v.

ROOSEVELT HUDSON HARRIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals reversing the judgment of conviction (A. 24-26) is reported at 412 F.2d 796.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1969. By order of Mr. Justice Stewart, dated June 26, 1969, the time for filing a petition for a writ of certiorari was extended to and including July 26, 1969. The petition for a writ of certiorari was filed on July 25, 1969, and granted on February 24, 1970. By order of December 14, 1970, undersigned counsel was appointed by the Court to represent the respondent. The jurisdiction of the Court rests upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the Court of Appeals correctly conclude that the affidavit, dependent upon the tip of an unidentified informant, failed to establish probable cause for the issuance of a search warrant?

CONSTITUTIONAL PROVISION

The Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTE INVOLVED

Subsection (a) (2) of 26 U.S.C. § 5205 provides in pertinent part:

> No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing

the determination of the tax or indicating compliance with the provisions of this chapter.

RULE INVOLVED

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (a) Authority to Issue Warrant. A search warrant authorized by this Rule may be issued by . . . a United States Commissioner within the district wherein the property sought is located.
>
> * * *
>
> (c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the commissioner and establishing the grounds for issuing the warrant.
>
> * * *
>
> (e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized . . . to suppress for use as evidence anything so obtained on the ground that ***
>
> (4) there was not probable cause for believing the existence of the grounds upon which the warrant was issued. ***

STATEMENT

The respondent was sentenced to prison for two years for possessing six and nine-sixteenths gallons of non-tax paid whiskey. (A. 30) 26 U.S.C. § 5205(a) (2). The whiskey was seized from respondent's shack and nearby outside areas, pursuant to a search warrant issued on the affidavit of a special investigator of the Alcohol and Tobacco Tax Division of the Internal Revenue Service. The heart of the affidavit was a tip received from an unidentified informant described by the investigator as "a prudent person".

Respondent filed a motion to suppress the seized liquor alleging that the affidavit did "not contain sufficient information upon which a search warrant could or should have been issued" in that it failed, among other things, to "state the reputation of the informant." (A. 28)

In essence, the affidavit contained the following recitations (A. 3-4):

(1) The investigator-affiant stated that the respondent "had a reputation with me for over 4 years" as a trafficker in non-tax paid whiskey.

(2) Over the 4 year period, the affiant had "received numerous information from all types of persons" as to respondent's "activities".

(3) "[D]uring this period of time" a named constable had located a cache of illegal whiskey "in an abandoned house under Harris control. . ."

(4) Finally, on the day the affidavit was made, the affiant interviewed an unnamed informant whom he "found . . . to be a prudent person" and obtained from him "a sworn verbal statement" that:

(a) The informant had purchased illicit whiskey from the respondent's residence for more than two years, most recently within the past two weeks.

(b) The informant had "knowledge" of a person who had purchased illicit whiskey there within the past two days.

(c) The informant had "personal knowledge" that the illicit whiskey was consumed by purchasers in a building on the premises known as the "dance hall" and had seen the respondent on numerous occasions go to yet another building on the premises about 50 yards from the residence "to obtain the whiskey" for the informant and others.

The informant did not testify at the hearing on the motion to suppress, nor, so far as appears, at the trial.[1] The motion to suppress was overruled (A. 29) and renewed unsuccessfully at trial. (R. Doc. #10)

SUMMARY OF ARGUMENT

The requirements for a search warrant affidavit reflected in this Court's major decisions, *Nathanson v. United States*, 290 U.S. 41, *Aguilar v. Texas*, 378 U.S. 108, *United States v. Ventresca*, 380 U.S. 102, and *Spinelli v. United States*, 393 U.S. 410 fully respond to the reality that "probable cause is a practical, non-technical conception". *Brinegar v. United States*, 338 U.S. 160, 176. Accordingly, the unanimous decision below faithfully adheres to the commonsense teachings underlying a proper analysis of probable cause. The Court of Appeals properly found this affidavit insufficient because it rested upon a tip from an unidentified informant without providing a basis upon which a magistrate could assess the informant's credibility.

This affidavit attests to the informant's credibility by describing him as "a prudent person" without affording any facts or reasons that would enable a magistrate to evaluate the officer's appraisal. The Court of Appeals thus properly examined the tip itself and then looked at "other allegations which corroborate the information contained in the hearsay report". *Spinelli, supra*, 393 U.S. at 415. But this affidavit lacks such corroboration and there was no investigation subsequent to the tip to substantiate any of the information it purported to convey.

Although there is no rigid rule requiring independent investigation and no technical formula for a sufficient affidavit, the Fourth Amendment does require *independent*

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[1] The transcript of the hearing on the motion to suppress at which the affiant alone testified is reprinted in the Appendix (A. 6-23). The trial proceedings were not transcribed.

assessment of "probable cause" by the issuing magistrate. When an informer's tip is the heart of the application for a warrant, a magistrate can conclude that "probable cause" exists only if he is presented with a basis for concluding that the tip conveys "reasonably trustworthy information". *Brinegar, supra,* 338 U.S. at 175-76. Commonsense teaches that if a tip is uncorroborated, trustworthiness will largely depend upon the credibility of the person who gives it. A magistrate abdicates his constitutional function if he merely accepts, without a basis for independent judgment, the assertion of an officer that the informant is "prudent" or "credible". When the tip is pivotal, such blind faith is tantamount to accepting blindly the officer's "mere affirmance of belief" in probable cause. *Nathanson, supra,* 290 U.S. at 47.

Most importantly, the decision below does not impair the ability of the police to establish the credibility of an informant who has not previously supplied information. In cases such as this, with no emergency characteristics and no likelihood that evidence or the accused will disappear, police commonly and effectively support a naked tip by asking an untested informant to make the "buy" under monitored conditions. If the informant wishes to remain anonymous, that "buy" will justify a subsequent search pursuant to warrant so that the evidence can be produced at trial through a police witness. Such a procedure protects the police, improves cases, develops the informant's credibility for possible future use, and is otherwise convenient and effective. The availability of that "reasonable" procedure cannot be ignored in a Fourth Amendment analysis.

Finally, the Court should consider whether the writ was providently granted in this case. If the grant was prompted by the problem of the first-time informant, criminally uninvolved, who may therefore be more reliable than a "regular", this case presents an inadequate record. Not only is there no evidence that this informant was "first-time", but there is proof that he regularly violated the same

statute underlying respondent's conviction. Accordingly, this record does not expose, much less explore, the legitimate needs of law enforcement that may arise, particularly in emergencies, when information is received from an untested, but presumptively credible source. Especially in the Fourth Amendment area where "reasonable" behavior under particular circumstances is the benchmark, constitutional judgments should be informed by a full and unambiguous record.

ARGUMENT

The Government's attack upon the unanimous judgment below rests upon two propositions: (1) that it is a typical result of applying "the guidelines suggested in *Aguilar* and *Spinelli* in a rigid, technical manner that loses sight of the commonsense nature of the relevant inquiry", (Gov't Br. p. 10); and (2) that affirmance will make it "very difficult to establish the credibility of an informant who has not previously supplied information to the police or who desires to remain anonymous". (Gov't. Br. p. 15) Ironically, both propositions lose sight of the commonsense foundation for this Court's affidavit rulings as applied in the decision below, as well as the commonsense alternatives that police commonly and effectively use with untested informants in cases such as this.[2]

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[2]Since the judgment below was unanimous, three of the four judges who have passed upon this affidavit have found it lacking. *Cf. Spinelli v. United States*, 393 U.S. at 430 (Black, J. dissenting) (Seven of nine judges upholding the affidavit). "Although the reviewing court will pay substantial deference to judicial determinations of probable cause," *Aguilar v. Texas*, 378 U.S. at 111, this case is much weaker than *Spinelli* for application of that principle.

I. THIS AFFIDAVIT GAVE NO BASIS IN LAW OR COMMONSENSE FOR A FINDING BY THE COMMISSIONER OF PROBABLE CAUSE TO ISSUE A SEARCH WARRANT.

Applying the teachings of this Court's decisions, the Court of Appeals found no adequate justification in the supporting affidavit for the Commissioner's "probable cause" determination. Since a tip from an anonymous informant occasioned the search and lay at the heart of the affidavit, the court focused primarily upon it. Examining the tip alone and in the full context of the affidavit, the court found no basis upon which the Commissioner could have reached an *independent* judgment that the informant's report was trustworthy. And since, without a trustworthy tip, the affidavit plainly failed to establish "probable cause" to search, the search was held unlawful. This decision does no more than reaffirm the good sense underlying the requirement that when a search depends upon an informer's tip, a magistrate must be presented with some basis for confirming on his own the trustworthiness of the hearsay information.

The need for independent confirmation derives from first principles of Fourth Amendment jurisprudence:

> The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Johnson v. United States,* 333 U.S. 13, 14; See also *United States v. Lefkowitz,* 285 U.S. 452, 464.

To ensure that the ultimate judgment of "probable cause" does not rest with the enforcing officer, an officer's affidavit must present to the intervening magistrate the materials for a realistically independent judgment. Accordingly, in *Nathanson v. United States,* 290 U.S. 41, 47, this Court held that even when an officer's affidavit does not rest upon

an informant source, a magistrate "may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor *from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough*". (emphasis added)

Since a law enforcement officer is identified, under oath in the affidavit, presumptively trustworthy, and most often involved in a continuing institutional relationship with the issuing magistrate, his affidavit need not attest to his own credibility.[3] That affidavit, reporting the officer's own observations, satisfies the demands of the Fourth Amendment if it sets forth sufficient facts from which a magistrate may confirm the judgment that those facts, taken as true, establish probable cause to search.

When a tip from an unidentified informant is the crux of the officer's affidavit, however, a second judgment must be rendered by the issuing magistrate—a judgment as to the trustworthiness of the information coming from that unknown source. For however trustworthy the affiant officer, commonsense tells us that his presentation of "probable cause" is only as strong, in the informer setting, as the *credibility* of the informer and the *reliability* of the evidence upon which the informer based his judgment. *Aguilar v. Texas, supra,* did no more than give expression to those two criteria for judgment.[4] More important still, these cri-

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[3]In addition, there will be other circumstances when the credibility of a source is presumed. See e.g., *United States v. Ventresca,* 380 U.S. 102, 110-11 (other police officers).

[4]The twin standards of "credibility" and "reliability" are embodied in the proposed amendments to Rule 41(c) and Rule 4(a) of the Federal Rules of Criminal Procedure for the United States District Courts (Prelim. Draft 1970)

Rule 41(c) would be amended in part to provide that:

> The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, *provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a*

teria are rooted in the most fundamental articulations of the Fourth Amendment's requirement for probable cause:

> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." . . . Since Marshall's time, at any rate, it has come to mean more than bare suspicion. Probable cause exists where "the facts and circumstances within their [the officers'] knowledge, *and of which they had reasonably trustworthy information* [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.[5] (emphasis supplied) *Brinegar v. United States*, 338 U.S. 160, 175-76.

Put in summary terms, if there is a basis upon which a magistrate can independently assess the informer credible, there is cause to believe that his report truthfully recounts an actual experience. And then if there is a basis for independently confirming the quality of the evidence contained in his report, there is cause to believe it reliable or probative as well. Together these elements of credibility and reliability establish the tip as "reasonably trustworthy information", 338 U.S. at 175, within the meaning of the "probable cause" requirement. Translated into the terms of commonsense, in evaluating the substance of a report from an unknown source, "a man of reasonable caution", *Brinegar, supra*, 338 U.S. at 175-76, would want sufficient facts to

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factual basis for the information presented. (emphasis supplied)

See also the Advisory Committee Notes to these sections.

[5] Although *Brinegar* involved a search without a warrant, its standard has been applied in warrant cases. See e.g. *United States v. Ventresca*, 380 U.S. 107, 108; *Jones v. United States*, 362 U.S. 257, 270. See also *Spinelli v. United States, supra*, at 417, note 5.

Strictly speaking, in warrant cases the standard should be articulated as probable cause to believe that items connected with criminal activity will be found in the place to be searched. Hall, Kamisar, LaFave and Israel, Modern Criminal Procedure, 257 (3rd Ed. 1969). See *Rugendorf v. United States*, 376 U.S. 528, 533.

support a belief both that the report has not been falsified or distorted and that its accusations rest on something more than "a casual rumor", "an offhand remark heard at a neighborhood bar", or "an individual's general reputation". *Spinelli, supra,* at 416-17.

There are no rigid rules or tests to be met in arriving at such commonsense judgments. This Court's opinions discuss some of the ways in which affidavits can meet these constitutional requirements. And the decision below reflects only the judgment that under no plausible approach is a case for probable cause made in this affidavit.

The affidavit here is utterly deficient because (1) apart from the informant's tip, it fails to establish "probable cause" that illegal whiskey would be found on the premises; (2) the tip fails to establish probable cause since the affidavit affords no basis for believing the informant credible; and (3) the affidavit viewed as a whole adds no substance to the sum of its parts.

A. The Affidavit Apart From the Tip

The Government does not contend that this affidavit can stand apart from the tip. Indeed, no such contention would even have been plausible, for apart from the informant's report, the affidavit is all but rank gossip. The affiant asserts that Harris "had a reputation with me for over 4 years" as a trafficker in illegal whiskey. This allegation does not even rise to the level of personal knowledge arguably present in the *Spinelli* allegation that the defendant therein was "known" to the FBI as a gambler. Even such an allegation was "not itself a sufficient basis for a magistrate's finding of probable cause". 393 U.S. at 418. And the weaker suspicion alleged here is enfeebled even further by the affidavit's designation of the "sources" of the reputation—"over this period I have received numerous information from all types of persons as to his activities".

The only other non-tip allegation pertains to premises different from the target of this search—"an abandoned house under Harris' control" where a stash of illegal whiskey was allegedly found by a local constable. More importantly, the affidavit describes that discovery as having occurred only sometime "during" the 4 year period. Presumably in recognition of these infirmities of place and time, the Government admitted on the motion to suppress that the allegation "could be stricken from the affidavit without effecting [sic] its validity".[6] See *Rosencranz v. United States*, 356 F.2d 310, n. 3 (1st Cir. 1966); *Schoeneman v. United States*, 317 F.2d 173, 177 (D. C. Cir. 1963); see also *Sgro v. United States*, 287 U.S. 206, 210.

Perhaps most notably, the affidavit contains no information derived from police investigation reasonably prior to the tip. Neither does it present corroborative information acquired after the tip was received. We do not suggest that independent police work is required in every case, but its total absence here serves to highlight the all-but-total dependence of this affidavit upon the trustworthiness of the tip allegations.

B. The Tip

As the Court of Appeals concluded, the affidavit's failure to support the credibility of the informant, see pp. 14-18 *infra*, is the fatal flaw in its presentation of the tip. We turn first, however, to a consideration of the quality of the evidence the informant relied upon.

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[6] This admission was made in the Government's Memorandum Brief opposing the motion. That Brief is a part of the Record in this Court, though not reprinted in the Appendix. (R. Doc. #8, p. 5) See Rule 36 (2) of this Court's Rules.

(1) *Qualitative Reliability*

The informant's report relies in part upon his personal observations. The Government's Brief overstates, however, the extent of the first-hand nature of the information conveyed.

The affidavit does recite the informant's own alleged purchase of whiskey from the Harris premises during the two years preceding the search "and most recently within the past 2 weeks". Fairly and properly, the Court of Appeals acknowledged that such a declaration of purchases "directly from the suspect at his residence is tantamount to an assertion of visual observation by the informant". (A. 25) But the tip's information closest in time to the search, purports to present evidence of "a person who purchased illicit whiskey within the past *two days* from the house. . . ." (emphasis supplied) Contrary to the Government's suggestion, this allegation does not rest upon "personal knowledge" tantamount to a visual observation. (Gov't. Br. p. 11) Instead, by contrast with two conspicuous references to the informant's "*personal* knowledge" of facts, the affidavit describes this feature of the informant's story as resting only upon his "knowledge" of the third party's purchase. It thus suggests that the informant's "knowledge" of the most recent purchase was the product, not of his eyewitness experience, but of hearsay from yet another unidentified informant of unknown credibility. Accordingly, there is a serious infirmity in the only item in the affidavit whose timing could indicate that whiskey would still be found on the Harris premises.

Finally, the affidavit relates the informant's "personal knowledge" that whiskey was consumed in an outbuilding on the Harris premises known as the "dance hall" and alleges that he saw Harris go to another outbuilding about 50 yards from his residence "on numerous occasions" to obtain whiskey. Yet for all that appears from this recitation, these events could well have occurred early in the two year purchase relationship alleged. Indeed, that view is

strengthened by the affiant's use elsewhere in the affidavit of "two weeks" and "two days" to describe events that took place in reasonable proximity to the search. See *Rosencranz v. United States*, 356 F.2d 310 (1st Cir. 1966).

(2) *The Informant's Credibility*

However sufficient the qualitative reliability of the informant's evidence, the affidavit cannot survive the fundamental flaw in its presentation of the tip—an utter failure to provide a basis for a magistrate's independent judgment that the informer was a credible person. Once again, commonsense tells us that even a report containing items of the most probative and reliable quality is no better than the basis for believing the items true in the first place. An informer's incriminating conclusion may be based entirely on multiple allegations of personal observation, but "a man of reasonable caution" would not find that conclusion probable unless there were a basis for believing that those observations in fact took place.

In this case, the magistrate was presented with no more basis for assessing the credibility of the anonymous informer than the affiant's conclusion that he found him "a prudent person".

At worst, this characterization is wholly irrelevant to the issue of the informant's credibility. For as the Court of Appeals observed, describing a person as "prudent" says that he is "circumspect in the conduct of his affairs" (A. 25), but says nothing as to his truth-telling habit of mind. The term may be as apt for a successful confidence man as for the most honest citizen.

The defective core of the allegation, however, is not the failure to use the magic words. The message of *Ventresca, supra*, may be sufficient to counsel a "realistic" interpretation of "prudent" so as to save its credibility connotation.[7]

[7] "If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants . . . must

380 U.S. at 108. But *Ventresca* likewise counsels that a "purely conclusory" allegation such as this cannot be saved by any canons of interpretation:

> Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. *Ventresca, supra,* 380 U.S. at 109.

By contrast, the characterization of this informant as "prudent", without any statement of the basis for the affiant's appraisal, leaves the magistrate with only a rubber stamp in hand. In *Ventresca's* language, "no *reason* for crediting the source of information is given". (emphasis supplied) 380 U.S. at 109.

On the vital issue of credibility, therefore, this affidavit all but reproduces the bald assertions of "reliable information" from a "credible person" in *Aguilar*, 378 U.S. at 109, or from a "reliable informant" in *Spinelli*, 393 U.S. at 422. In fact, where the tip is as pivotal as this one and the credibility of the informant as crucial, for a magistrate to accept the affiant's naked faith in the informant is tantamount to acceptance of his "[m]ere affirmance of belief" in probable cause. And that, this Court from *Nathanson* on has consistently found "not enough".[8] 290 U.S. at 47. *See also, Terry v. Ohio*, 392 U.S. 1, 22.

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be tested and interpreted by magistrates and courts in a commonsense and realistic fashion." 380 U.S. at 108.

[8]The Government appropriately consigns to a footnote (Gov't. Br., p. 13, note 2), the suggestion that the "sworn verbal statement" of the informant adds more. Although the Government characterizes it as "under oath", no record testimony supports that description. *And Cf., Wheatman v. People*, 304 N.Y.S. 2d 904 (1969) (sworn anonymous grand jury testimony insufficient). Indeed there is doubt that the affiant was empowered to administer an oath in this setting. See 26 U.S.C. § 7602, 7622 and Treas. Regs. § 301.7602-1; 301.7603-1; 301.7622-1. Even if he was, however, the guarantee of anonymity to the informer and the absence of a record of his words reduces the prosecutorial threat to him to a nullity. And to the extent an informer is aware of the law protecting his anonymity, *McCray v. Illinois*, 386 U.S. 300 and disabling third parties from attacking the

No more is added to the trustworthiness of the tip by the Government's reliance upon the so-called "explicit detail" it contains. (Gov't. Br. p. 12). This Court acknowledged the potentially supportive role of such detail in *Spinelli*, by reference to the facts of *Draper v. United States*, 358 U.S. 307. In *Draper*, the informant related "with minute particularity", *Spinelli, supra*, 393 U.S. at 417, details as to the place and time of a trip a narcotics dealer would soon take, and then more detail as to his dress and appearance upon returning.

Several points demonstrate the irrelevance of *Draper*-type detail to the circumstances of this case. At the outset, it should be noted that the *Spinelli* Court did not refer to the *giving* of *Draper*-type detail as buttressing the *credibility* of the informant.[9] The ability to give such detail was used instead to suggest that the particularity of some tips may be such as to resolve doubt in ambiguous affidavits as to how the informant "came by the information" he related. 393 U.S. at 416. Since, unlike much in this affidavit, the *Draper* information did not specify whether the informer obtained it by rumor or personal experience, the details given in the tip could lead a magistrate reasonably to "infer that the informant had gained his information in a reliable way". 393 U.S. at 417. For, as Mr. Justice White explicated in *Spinelli*, "the kind of information related by the informant [in *Draper*] is not generally sent ahead of a person's arrival in a city except to those who are intimately connected with making careful arrangements for meeting him".

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truth of his allegations, See, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 Harv. L. Rev. 825 (1971), the inhibitions on informer falsification or distortion are reduced even further.

If statements under oath should ever be permitted to substantiate the credibility of an informant, the least the law should require is an informant's affidavit sealed by the court to protect his anonymity.

[9]In *Draper*, the informant was named and had proved reliable on other occasions. 358 U.S. at 309.

393 U.S. at 426. (concurring opinion) Notably, the "details" the Government points to in this tip yield no such added support for an inference that the informant learned of those details by personal involvement in the alleged criminal behavior. The informant "recited the approximate distance between the respondent's residence and the outbuilding where he kept his stock of illegal whiskey". (Gov't. Br. p. 12). Unlike the sufficient details in *Draper*, and like those held insufficient in *Spinelli*, the "details" related here describe only publically observable characteristics of an existing residential arrangement, and not predictive particulars about a verifiable future event. Indeed, "[T]his meager report could easily have been obtained from an offhand remark heard at a neighborhood bar". *Spinelli, supra*, 393 U.S. at 417.

More importantly, to the extent the *Draper* details bore upon the truth-telling nature of the informant at all, they did so not because the details, as here, were merely given in the tip, but because they were confirmed by the kind of subsequent police verification wholly absent from this case.[10] Indeed, the opportunity for solid corroborative work was plainly available and convenient here. See 19 *infra*. To be sure, it may be doubtful that corroboration of the scant details provided in this tip would have sufficed to yield probable cause under *Draper*. But if *Draper* can be read broadly enough to attribute significance to corroboration of even these wholly innocent static particulars about the names and locations of buildings on a man's premises, that conclusion only further points up the importance

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[10]It is worth noting that, not prior to the search but during it, the investigator did look into both the "dance hall" and the "outbuilding" for the stock of whiskey the tip implied would be found there. It was not found. (A. 17) Indeed, the only whiskey found on any premises unambiguously belonging to Harris was little more than half a gallon found in his house. That may explain why he was convicted of "possession" rather than "sale" as the tip had implicitly forecasted.

of an adequate presentation of "credibility" information in an affidavit. For then the requirement that the informer be demonstrably credible stands as the only potent legal safeguard against false or distorted accusations by irresponsible anonymous acquaintances of the accused.[11]

C. The Affidavit as a Whole

The Government's last retreat in the effort to save this affidavit is to view the totality of its contents. *Spinelli* properly counsels that "if the tip is found inadequate" on its own "the other allegations which corroborate the information contained in the hearsay report should then be considered". 393 U.S. at 415. But the other allegations here do not even approximate the probative value of the recent corroborative information held insufficient in *Spinelli*. This affidavit adds to the informer's tip Harris' four year old "reputation" and unspecified "numerous information from all types of persons as to his activities". That alone is "but a bald and unilluminating assertion of suspicion" of the sort *Spinelli* held "entitled to no weight in appraising the magistrate's decision", 393 U.S. at 414 and useless to give "additional weight to allegations that would otherwise be insufficient". 393 U.S. at 419. Since the only item other than such gossip pertains to whiskey found elsewhere and unrelated in time to this search, the rest of the affidavit adds little to the trustworthiness of the tip on which its sufficiency depends.

Indeed, this Court should give body to its "commonsense" approach to affidavits such as this by stepping back from a dissection of its parts to view the document as a whole. At the time of the application for this warrant, law enforcement officers knew no more than that Harris had a reputation for trafficking, substantiated to some degree by

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[11] See note 8, *supra*, for legal barriers making it unlikely that the source or content of such accusations will ever come to light.

one incident not at his residence, and perhaps four years stale. Ought this Court to say that the Fourth Amendment renders people with such meager histories forever insecure in their "houses" so long as an anonymous accuser is regarded as "prudent" by the officer receiving his tip?

Nothing in the history or purpose of Fourth Amendment protection suggests that personal security is so tenuously held. Nothing in this Court's cases advises otherwise. And there is nothing as well to the "commonsense" argument advanced here that law enforcement will be hamstrung if this case stands. In a setting such as this, law enforcement authorities have developed ready and convenient techniques for processing tips from untested informers. Where, as here, there is no suggestion that the accused is leaving town after four years, no hint that his alleged business is terminating, and no other facts suggesting emergency, the police simply ask an informant to substantiate his claim that a purchase can be made by making one or arranging that it be made by someone else. Circumstances are then easily brought about in which the police can monitor the purchase to ensure that the buyer visits the place of purchase without any of the contraband to be obtained, and sometimes with a supply of marked money. *See e.g., People v. Dillon,* 44 Ill. 2d 482 (1970); *See also,* Harney & Cross, The Informer in Law Enforcement, pp. 26, 79 (2nd Ed. 1968). After a bottle of whiskey or a packet of narcotics has been so purchased, the informer's tip is of proven reliability, a subsequent search for another bottle or packet is constitutional, and indeed, an informer, "reliable" for future use, has been developed.[12]

The Fourth Amendment's "probable cause" requirement, implementing its protection against "unreasonable" search,

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[12]In still other circumstances, the reliability of informers new to a particular locality can be substantiated by contact with former officers with whom they have worked. See *e.g., Smith v. United States,* 358 F.2d 833 (D. C. Cir. 1966) (Burger, J.)

should be regarded practically, with a view toward accommodating the conflicting needs presented by the almost infinite range of circumstances in which the Amendment is applicable.

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. *Brinegar, supra,* at 176.

In settings such as this, however, there is no substance to the claim that the interests of personal security and good police work are "opposing". The judgment below stands to require of law enforcement no more than is already common and effective practice, and no more than is required by a commonsense view of the Fourth Amendment.

II. IF THE COURT WISHES TO CONSIDER THE PROBLEM OF THE FIRST-TIME INFORMANT THIS WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

The Government represents that a particular concern "occasioned our request for certiorari in this case". (Gov't. Br. p. 13):

> In the past, this Court has recognized that an informant's reliability may be established by showing that he has previously given information that proved reliable. . . . We believe, however, that there are circumstances in which a magistrate should be allowed to issue a warrant on the basis of information supplied by a person who has never before

> provided information to the police. In fact, the person who supplies information to the police on only one occasion will often be a more reliable type of individual than one who supplies such information on a regular basis. The latter is likely to be someone who is himself involved in criminal activity or is, at least, someone who enjoys the confidence of criminals.

The concern expressed in these terms is entirely appropriate, for there may well be "circumstances" in which a magistrate should be allowed leeway with first-time informants. A flexible approach to the Fourth Amendment must anticipate that such a setting will arise.

This case, however, is a wholly inappropriate vehicle for the resolution of these concerns. As a starting point, the Court should have before it a record in which it is unambiguous that the informant was in fact giving information for the first time. Such a record, properly made, would afford a firm basis for exposing and resolving such conflicts as are present between individual interests and law enforcement needs. There is not one whit of evidence in this record, however, to substantiate that the informant was in fact "first-time". More importantly, the record is devoid of testimony dealing with the circumstances under which the tip was obtained, the need to search at that time, or any of the other factors that are potentially critical to an assessment of the procedure actually used.[13] Accordingly, nothing in the record even begins to explore the concrete and practical considerations upon which sound Fourth Amendment rules should be fashioned. *See e.g. Wainwright v. City of New Orleans,* dismissed, 392 U.S. 598, 599 (record "too opaque", Harlan, J.; "too sketchy", Fortas, J. and Marshall, J.)

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[13]"Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court,* 387 U.S. 523, 536-37.

By contrast, the record does make clear that this informant was *not* the uninvolved citizen, but indeed one who violated on a regular basis the very statute underlying respondent's conviction. That statute makes it unlawful to "buy" illegal whiskey as well as to "sell" or "possess" it. 26 U.S.C. § 5205(a)(2). And the informant's report is a confession that he was often guilty of the very crime charged against the respondent—possession. The Government properly observes that one "who is himself involved in criminal activity" is likely to be less "reliable" than an informant who is not. *See also, People v. Lewis,* 49 Cal. Rptr. 579 (1966). If the Court should reach the merits of this case, that consideration is directly relevant to a commonsense view of whether "reliability" was sufficiently substantiated in this affidavit to establish probable cause. But the presense of a criminal informant is another reason for the Court to wait to address the Government's proper concern in a case that realistically presents it. Cases in which first-time information comes from victims or witnesses to violent crimes are common. *See e.g., Brown v. United States,* 365 F.2d 976 (D. C. Cir. 1966) (Burger, J.); *People v. Griffin,* 58 Cal. Rptr. 701, 711 and cases at note 6 (1967). Common also are cases of emergency involving first-time informants not from the criminal milieu. *See e.g., In re Boykin,* 39 Ill. 2d 617 (1968). This record, by contrast, illuminates none of the considerations those cases would properly tender under a balanced view of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the unanimous judgment of the Court of Appeals should be affirmed or the writ of certiorari dismissed.

STEVEN M. UMIN
Counsel for Respondent

March 1971

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* HARRIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 30. Argued March 23, 1971—Decided June 28, 1971

Respondent was convicted of possessing nontaxpaid liquor in violation of 26 U. S. C. § 5205 (a)(2). The Court of Appeals reversed on the ground that the federal tax investigator's affidavit supporting the search warrant, the execution of which resulted in the discovery of illicit liquor, was insufficient to establish probable cause. The affidavit stated that: respondent had a reputation with the investigator for over four years as being a trafficker of nontaxpaid distilled spirits; during that time the local constable had located illicit whiskey in an abandoned house under respondent's control; on the date of the affidavit the affiant had received sworn oral information from a person whom the affiant found to be a prudent person, and who feared for his life should his name be revealed, that the informant had purchased illicit whiskey from the residence described, for a period exceeding two years, most recently within two weeks; that the informant asserted he knew of another person who bought such whiskey from the house within two days; that he had personal knowledge that such whiskey was consumed in a certain outbuilding; and that he had seen respondent go to another nearby outbuilding to obtain whiskey for other persons. The Court of Appeals relied on *Aguilar* v. *Texas*, 378 U. S. 108, in stressing that affiant had never alleged that the informant was truthful, but only prudent, and on *Spinelli* v. *United States*, 393 U. S. 410, in giving no weight to affiant's assertion concerning respondent's reputation. *Held:* The judgment is reversed. Pp. 3—.

412 F. 2d 796, reversed.

Syllabus

THE CHIEF JUSTICE, joined by MR. JUSTICE BLACK, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEWART (as to the first sentence of item 1) concluded that:

1. The affidavit in this case, based on a tip similar to the one held sufficient in *Jones* v. *United States*, 362 U. S. 257 (which was approved in *Aguilar*, *supra*), contains an ample factual foundation for believing the informant which, when taken in conjunction with the informant's knowledge of respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant. Both the affidavit here and the one in *Jones* (contrary to the situation in *Spinelli*, *supra*) purport to relate an unidentified informant's personal observations and recite prior events within his knowledge. While the affidavit here, unlike the *Jones* affidavit, did not aver that the informant had previously given "correct information," an averment of previous reliability is not essential when supported, as here, by other information; and *Spinelli* is not to be read as precluding a magistrate's relying on an officer's knowledge of a suspect's reputation. Pp. 3–9.

THE CHIEF JUSTICE, joined by MR. JUSTICE BLACK, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN, concluded that:

2. The fact that the informant made a statement against his own penal interest when he admitted his illicit liquor purchases provides an additional basis for crediting his tip. Pp. 9–10.

BURGER, C. J., announced the Court's judgment and delivered an opinion, in which BLACK and BLACKMUN, JJ., joined, and in Part I of which STEWART, J., and in Part III of which WHITE, J., joined. BLACK, J., filed a concurring opinion. BLACKMUN, J., filed a concurring opinion. HARLAN, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 30.—October Term, 1970

United States, Petitioner, v. Roosevelt Hudson Harris. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 28, 1971]

Mr. Chief Justice Burger announced the judgment of the Court and an opinion in which Mr. Justice Black and Mr. Justice Blackmun join, and in Part I of which Mr. Justice Stewart joins, and in Part III of which Mr. Justice White joins.

We granted certiorari in this case to consider the recurring question of what showing is constitutionally necessary to satisfy a magistrate that there is a substantial basis for crediting the report of an informant known to the police, but not identified to the magistrate, who purports to relate his personal knowledge of criminal activity.

In 1967 a federal tax investigator and a local constable entered the premises of respondent Harris, pursuant to a search warrant issued by a federal magistrate, and seized jugs of whiskey upon which the federal tax had not been paid. The warrant had been issued solely on the basis of the investigator's affidavit, which recited the following:

> "Roosevelt Harris has had a reputation with me for over four years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information [*sic*] from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information

> from a person who fears for their life [*sic*] and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal information of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in the outbuilding known and utilized as the 'dance hall,' and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain whiskey for this person and other persons."

Respondent was subsequently charged with possession of nontaxpaid liquor, in violation of 26 U. S. C. § 5205 (a)(2). His pretrial motion to suppress the seized evidence on the ground that the affidavit was insufficient to establish probable cause was overruled, and he was convicted after a jury trial and sentenced to two years' imprisonment. The Court of Appeals for the Sixth Circuit reversed the conviction, holding that the information in the affidavit was insufficient to enable the magistrate to assess the informant's reliability and trustworthiness. 412 F. 2d 796, 797 (1969).

The Court of Appeals relied on *Aguilar* v. *Texas*, 378 U. S. 108 (1964), in which we held that an affidavit based solely on the hearsay report of an unidentified informant must set forth "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'" *Id.*, at 114. It concluded that the affidavit was insufficient because no information was presented

to enable the magistrate to evaluate the informant's reliability or trustworthiness. The court noted the absence of any allegation that the informant was a "truthful" person, but only an allegation that the informant was "prudent." Having found the informant's tip inadequate under *Aguilar*, the Court of Appeals, relying on *Spinelli* v. *United States*, 393 U. S. 410 (1969), looked to the remaining allegations of the affidavit to determine whether they provided independent corroboration of the informant. The Court of Appeals held that the constable's prior discovery of a cache on respondent's property within the previous four years was too remote, and citing certain language from *Spinelli*, it gave no weight whatever to the assertion that respondent had a general reputation known to the officer as a trafficker in illegal whiskey.

For the reasons stated below, we reverse the judgment of the Court of Appeals and reinstate the judgment of conviction.

I

In evaluating the showing of probable cause necessary to support a search warrant, against the Fourth Amendment's prohibition of unreasonable searches and seizures, we would do well to heed the sound admonition of *United States* v. *Ventresca*, 380 U. S. 102 (1965):

> "[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one here, must be tested in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under commonlaw pleadings have no proper place in this area. A grudging or negative attitude

by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." 380 U. S., at 108.

Aguilar in no way departed from these sound principles. There a warrant was issued on nothing more than an affidavit reciting:

> "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above-described premises for the purpose of sale and use contrary to the provisions of the law." *Id.*, at 109.

The affidavit, therefore, contained none of the underlying "facts or circumstances" from which the magistrate could find probable cause. *Nathanson* v. *United States*, 290 U. S. 41, 47 (1933). On the contrary, the affidavit was a "mere affirmance of belief and suspicion" (*Nathanson, supra*, at 41) and gained nothing by the incorporation by reference of the informant's unsupported belief. See *Aguilar, supra*, at 114 n. 4.

Significantly, the Court in *Aguilar* cited with approval the affidavit upheld in *Jones* v. *United States*, 362 U. S. 257 (1962). That affidavit read in pertinent part as follows:

> "In the late afternoon of Tuesday, August 20, 1957, I, Detective Thomas Didone, Jr., received information that Cecil Jones and Earline Richardson were involved in the illicit narcotic traffic and that they kept a ready supply of heroin on hand in the above mentioned apartment. The source of information also relates that the two aforementioned persons kept these same narcotics either on their person, under a pillow, on a dresser or on a window ledge in said apartment. The source of information goes

> on to relate that on many occasions the source of information has gone to said apartment and purchased narcotic drugs from the above mentioned persons and that the narcotics were secreated [*sic*] in the above mentioned places. The last time being August 20, 1957." *Id.*, at 267–268 n. 2.

The substance of the tip, held sufficient in *Jones*, closely parallels that here held insufficient by the Court of Appeals. Both recount personal and recent* observations by an unidentified informant of criminal activity, factors showing that the information had been gained in a reliable manner, and serving to distinguish both tips from that held insufficient in *Spinelli, supra*, in which the affidavit failed to explain how the informant came by his information. *Spinelli, supra*, at 416.

The Court of Appeals seems to have believed, however, that there was no substantial basis for believing that the tip was truthful. Indeed, it emphasized that the affiant had never alleged that the informant was truthful, but only "prudent," a word that "signifies that he is circumspect in the conduct of his affairs, but reveals nothing about his credibility." 412 F. 2d, at 797–798. Such a construction of the affidavit is the very sort of hypertechnicality—"the elaborate specificity once exacted under common law"—condemned by this Court in *Ventresca*. A policeman's affidavit "should not be judged as an entry in an essay contest," *Spinelli, supra*, at 438

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*We reject the contention of respondent that the informant's observations were too stale to establish probable cause at the time the warrant was issued. The informant reported having purchased whiskey from respondent "within the past two weeks," which could well include purchases up to the date of the affidavit. Moreover, these recent purchases were part of a history of purchases over a two-year period. It was certainly reasonable for a magistrate, concerned only with a balancing of probabilities, to conclude that there was a reasonable basis for a search.

(Fortas, J., dissenting), but rather must be judged by the facts it contains. While a bare statement by an affiant that he believed the informant to be truthful would not, in itself, provide a *factual* basis for crediting the report of an unnamed informant, we conclude that the affidavit in the present case contains an ample factual basis for believing the informant which, when coupled with his own knowledge of the respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant. The accusation by the informant was plainly a declaration against interest since it could readily warrant a prosecution and could sustain a conviction against the informant himself. This will be developed in Part III.

II

In determining what quantum of information is necessary to support a belief that an unidentified informant's information is truthful, *Jones* v. *United States*, *supra*, is a suitable benchmark. The affidavit in *Jones* recounted the tip of an anonymous informant, who claimed to have recently purchased narcotics from the defendant at his apartment, and described the apartment in some detail. After reciting the substance of the tip the affiant swore as follows:

> "Both the aforementioned persons are familiar to the undersigned and other members of the Narcotic Squad. Both have admitted to the use of narcotic drugs and display needle marks as evidence of same.
>
> "This same information, regarding the illicit narcotic traffic, conducted by [the defendant] has been given to the undersigned and to other members of the narcotic squad by other sources of information.
>
> "Because the source of information mentioned in the opening paragraph has given information to the undersigned on previous occasion and which was cor-

> rect, and because this same information is given by other sources does believe that there is now illicit narcotic drugs being secreated [*sic*] in the above apartment . . . ." *Id.*, at 267–268 n. 2.

Mr. Justice Frankfurter, writing for the Court in *Jones*, upheld the warrant. Although the information in the affidavit was almost entirely hearsay, he concluded that there was "substantial basis" for crediting the hearsay. The informant had previously given accurate information; his story was corroborated by "other sources" (albeit unnamed); additionally the defendant was known to the police as a user of narcotics. Justice Frankfurter emphasized the last two of these factors:

> "Corroboration through other sources of information reduced the chance of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to scepticism than would such a charge against one without such a history." *Id.*, at 271.

Aguilar cannot be read as questioning the "substantial basis" approach of *Jones*. And unless *Jones* has somehow, without acknowledgment, been overruled by *Spinelli*, there would be no basis whatever for a holding that the affidavit in the present case is wanting. The affidavit in the present case, like that in *Jones*, contained a substantial basis for crediting the hearsay. Both affidavits purport to relate the personal observations of the informant—a factor that clearly distinguishes *Spinelli*, in which the affidavit failed to explain how the informant came by his information. Both recite prior events within the affiant's own knowledge—the needle marks in *Jones* and Constable Johnson's prior seizure in the present case—indicating that the defendant had previously trafficked in contraband. These prior events again distinguish *Spinelli*, in which no facts were supplied to support

the assertion that Spinelli was "known . . . as a bookmaker, an associate of bookmakers, a gambler and an associate of gamblers." *Spinelli, supra,* at 422.

To be sure there is no averment in the present affidavit, as there was in *Jones,* that the informant had previously given "correct information," but this Court in *Jones* never suggested that an averment of previous reliability was necessary. Indeed, when the inquiry is, as it always must be in determining probable cause, whether the informant's *present* information is truthful or reliable, it is curious, at the very least, that MR. JUSTICE HARLAN would place such stress on vague attributes of "general background, employment, . . . position in the community . . . ." (Dissent, *infra,* at 15.) Were it not for some language in *Spinelli,* it is doubtful that any of these reputation attributes of the informant could be said to reveal any more about his present reliability than is afforded by the support of the officer's personal knowledge of the suspect. In *Spinelli,* however, the Court rejected as entitled to no weight the "bald and unilluminating" assertion that the suspect was known to the affiant as a gambler. 393 U. S., at 414. For this proposition the Court relied on *Nathanson* v. *United States,* 290 U. S. 41 (1933). But a careful examination of *Nathanson* shows that the *Spinelli* opinion did not fully reflect the critical points of what *Nathanson* held since it was limited to holding that reputation, *standing alone,* was insufficient; it surely did not hold it irrelevant when supported by other information. This reading of *Nathanson* is confirmed by *Brinegar* v. *United States,* 338 U. S. 160 (1949), in which the Court, in sustaining a finding of probable cause for a warrantless arrest, held proper the assertion of the searching officer that he had previously arrested the defendant for a similar offense and that the defendant had a reputation for hauling liquor. Such evidence would rarely be admissible at trial, but the Court

took pains to emphasize the very different functions of criminal trials and preliminary determinations of probable cause. Trials are necessarily surrounded with evidentiary rules "developed to safeguard men from dubious and unjust convictions." *Id.*, at 174. But before the trial we deal only with probabilities that "are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar, supra,* at 175.

We cannot conclude that a policeman's knowledge of a suspect's reputation—something that policemen frequently know and a factor that impressed such a "legal technician" as Justice Frankfurter—is not a "practical consideration of everyday life" upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip. To the extent that *Spinelli* prohibits the use of such probative information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation.

III

Quite apart from the affiant's own knowledge of respondent's actvities, there was an additional reason for crediting the informant's tip. Here the warrant's affidavit recited extrajudicial statements of a declarant, who feared for his life and safety if his identity was revealed, that over the past two years he had many times and recently purchased "illicit whiskey." These statements were against the informant's penal interest, for he thereby admitted major elements of an offense under the Internal Revenue Code. Section 5205 (a)(2), Title 26, United States Code, proscribes the sale, purchase or possession of unstamped liquor.

Common sense in the important daily affairs of life would induce a prudent and disinterested observer to

credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support finding of probable cause to search. That the informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct. Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another. But here the informant's admission that over a long period and currently he had been buying illicit liquor on a certain premise, itself and without more, implicated that property and furnished probable cause to search.

It may be that this informant's out-of-court declarations would not be admissible at respondent's trial under *Donnelly* v. *United States*, 228 U. S. 243 (1913), or under *Bruton* v. *United States*, 391 U. S. 123 (1968). But *Donnelly*'s implications that statements against penal interest are without value and *per se* inadmissible has been widely criticized. See the dissenting opinion of Justice Holmes in *Donnelly*, *supra*, at 277; 5 J. Wigmore, Evidence, § 1477, and has been partially rejected in Rule 804 of the Proposed Rules of Evidence for the District Courts and Magistrates. More important, the issue in warrant proceedings is not guilt beyond reasonable doubt but probable cause for believing the occurrence of a crime and the secreting of evidence in a specific premise. See *Brinegar* v. *United States*, *supra*, at 173. Whether or not *Donnelly* is to survive as a rule of evidence in federal trials, it should not be extended to warrant proceedings to prevent magistrates from crediting, in all circumstances, statements of a declarant containing admissions of criminal conduct. As for *Bruton*, that case rested on the Confrontation Clause of the Sixth Amendment which

seems inapposite to *ex parte* search warrant proceedings under the Fourth Amendment.

It will not do to say that warrants may not issue on uncorroborated hearsay. This only avoids the issue of whether there is reason for crediting the out-of-court statement. Nor is it especially significant that neither the name nor the person of the informant was produced before the magistrate. The police themselves almost certainly knew his name, the truth of the affidavit is not in issue, and *McCray* v. *Illinois*, 386 U. S. 300 (1967), disposed of the claim that the informant must be produced whenever the defendant so demands.

Reversed.

MR. JUSTICE STEWART joins in Part I of the Court's opinion and in the judgment.

MR. JUSTICE WHITE agrees with Part III of the Court's opinion and has concluded that the affidavit, considered as a whole, was sufficient to support issuance of the warrant. He therefore concurs in the judgment of reversal.

SUPREME COURT OF THE UNITED STATES

No. 30.—October Term, 1970

United States, Petitioner, *v.* Roosevelt Hudson Harris.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 28, 1971]

Mr. Justice Black, concurring.

While I join the opinion of The Chief Justice which distinguishes this case from *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and *Spinelli* v. *United States*, 393 U. S. 410 (1969), I would go further and overrule those two cases and wipe their holdings from the books for the reasons, among others, set forth in the dissent of Mr. Justice Clark in *Aguilar*, which I joined, and my dissent in *Spinelli*.

SUPREME COURT OF THE UNITED STATES

No. 30.—October Term, 1970

United States, Petitioner, *v.* Roosevelt Hudson Harris.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 28, 1971]

Mr. Justice Blackmun, concurring.

I join the opinion and judgment of the Court, but I add a personal comment in order to make very clear my posture as to *Spinelli* v. *United States*, 393 U. S. 410 (1969), cited in several places in the Court's opinion. I was a member of the 6–2 majority of the United States Court of Appeals for the Eighth Circuit in *Spinelli* v. *United States*, 382 F. 2d 871 (1967), which this Court by a 5–3 vote reversed, with the pivotal Justice concluding his concurring opinion, 393 U. S., at 429, by the observation that, "Pending full-scale reconsideration of that case [*Draper* v. *United States*, 358 U. S. 307 (1959)], on the one hand, or of the *Nathanson-Aguilar* cases on the other, I join the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an evenly divided Court." Obviously, I then felt that the Court of Appeals had correctly decided the case. Nothing this Court said in *Spinelli* convinced me to the contrary. I continue to feel today that *Spinelli* at this level was wrongly decided and, like Mr. Justice Black, I would overrule it.

SUPREME COURT OF THE UNITED STATES

No. 30.—October Term, 1970

United States, Petitioner, v. Roosevelt Hudson Harris.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 28, 1971]

Mr. Justice Harlan, with whom Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Marshall join, dissenting.

This case presents the question of how our decisions in *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and *Spinelli* v. *United States*, 393 U. S. 410 (1969), apply where magistrates in issuing search warrants are faced with the task of assessing the probable credibility of unidentified informants who purport to describe criminal activity of which they have personal knowledge, and where it does not appear that such informants have previously supplied accurate information to law enforcement officers.

I cannot agree that the affidavit here at issue provided a sufficient basis for an independent determination, by a neutral judicial officer, that probable cause existed. Accordingly, I would affirm the judgment of the Court of Appeals. Five members of this Court, however, for four separately expressed reasons, have concluded that the judgment below must be reversed. Some of the theories employed by those voting to reverse are wholly unlike any of the grounds urged by the Government.

I

Where, as in this case, the affiant states under oath that he has been informed of the existence of certain criminal activity, but has not observed that activity himself, a magistrate in discharging his duty to make an independent assessment of probable cause can properly issue a

search warrant only if he concludes that: (a) the knowledge attributed to the informant, if true, would be sufficient to establish probable cause; (b) the affiant is likely relating truthfully what the informer said; and (c) it is reasonably likely that the informer's description of criminal behavior accurately reflects reality.[1]

In the case before us, no one maintains that the magistrate's judgment as to elements (a) and (b) was not properly supported. Plainly the information set forth in the affidavit, if entitled to credit, establishes probable cause. And the magistrate was certainly entitled to rely on the agent's official status, his personal observation of the agent and the oath administered to him by the magistrate in concluding that the affiant's assertions as to what he had been told by the informer were credible.

The final component of the probable cause equation, here involved, is that it must appear reasonably likely that the informer's claim that criminal conduct has occurred or is occurring is probably accurate. Our cases establish that this element is satisfied only if there is reason to believe both that the informer is a truthful person generally and that he has based his particular conclusions in the matter at hand on reliable data, *Aguilar* v. *Texas*, 378 U. S. 108 (1964); *Spinelli* v. *United States*, 393 U. S. 410 (1969), for it is not reasonable to invade another's premises on the basis of information, even if it appears quite damning when simply taken at face value, unless there is corroboration of its trustworthiness.

[1] Of course where, as here, the affiant provides information in addition to the informant's tip, the magistrate could alternatively find probable cause, without examining the tip, if he can conclude that (a) the affiant is probably telling the truth and (b) the affidavit apart from the tip is sufficiently informative to establish probable cause. See *Spinelli* v. *United States*, 393 U. S. 410, 414 (1969). Concededly, this latter element is not present here. Government's Brief, at 16. Without crediting the tip, the affidavit is insufficient.

The fact that the magistrate has determined that the agent probably truthfully reported what the informant conveyed cannot, of course, establish the credibility or reliability of the information itself. More immediately relevant here, our cases have established that where the affiant relies upon the assertions of confidants to establish probable cause, the affidavit must set forth facts which enable the magistrate to judge for himself both the probable credibility of the informant and the reliability of his information, for only if this condition is met can a reviewing court be satisfied that the magistrate has fulfilled his constitutional duty to render an independent determination that probable cause exists. *Aguilar* v. *Texas*, 378 U. S. 108 (1964); *Spinelli* v. *United States*, 393 U. S. 410 (1969). Cf. *Giordenello* v. *United States*, 357 U. S. 480 (1958); *Nathanson* v. *United States*, 290 U. S. 41 (1933); *Whiteley* v. *Warden*, 401 U. S. — (1971).[2]

The parties are in agreement with these principles and have not urged that they be re-examined. Indeed, I think these precepts follow ineluctably from the constitutional command that "no Warrants shall issue, but upon probable cause." Whether, in this case, either of these tests of the thrustworthiness of the informer's tip has been met is, however, vigorously disputed.

II

Although the Court of Appeals did not address itself to this contention, respondent claims that the affidavit is insufficient to establish the reliability of the evidence upon which the informant based his conclusions. Of course, most of this data comes from alleged direct personal observation of the informant, surely a sufficient

[2] *Giordenello* and *Whiteley* each involved an arrest warrant rather than a search warrant, but the analysis required to determine the validity of either is basically the same.

basis upon which to predicate a finding of reliability under any test. However, respondent stresses that the allegation of direct observation of the criminal activity does not necessarily purport to embrace a period less than two weeks prior to the issuance of the search warrant. Moreover, the reliability of the source of the information that a purchase was made "within the past two days" is not established and, it is argued, the other information was too stale to support the issuance of a warrant.

This argument is premised upon an overly technical view of the affidavit. The informant is said to have personally bought illegal whiskey from respondent "within the past 2 weeks," which could well include a point in time quite close to the issuance of the warrant. More importantly, the totality of the tip evidently reveals that the informer purported to describe an on-going operation which he claimed he had personally observed over the course of two years. Giving due deference to the magistrate's determination of probable cause and reading the affidavit "in a commonsense and realistic fashion," *United States* v. *Ventresca*, 380 U. S. 102, 108 (1965), I must conclude that the affidavit sets forth sufficient data to permit a magistrate to determine that, if the informer was likely telling the truth, information adequate to support a finding of probable cause was likely obtained in a reliable fashion.

III

I turn, then, to what the parties have treated as the crux of the controversy before us. Respondent contends, and the Court of Appeals so held, that the affidavit does not sufficiently set forth facts and circumstances from which the magistrate might properly have concluded that the informant, in purporting to detail his personal observation, was probably telling the truth. Conversely, the Government principally argues that two factors, singly or

in combination, provided a factual basis for the magistrate's judgment that the tip was credible. First, the agent stated that he had "interviewed this person [and] found this person to be a prudent person." Second, the informant described the criminal activity in some detail and from his own personal knowledge.[3]

A

The Government's first contention misconceives the basic thrust of this Court's decisions in the *Nathanson, Giordenello, Aguilar, Spinelli,* and *Whiteley cases, supra.* The central proposition common to each of these decisions is that the determination of probable cause is to be made by the magistrate, not the affiant. That the agent-affiant determined the informer to be prudent cannot be a basis for sustaining this warrant unless magistrates are entitled to delegate their responsibilities to law enforcement officials. *Nathanson* held that an affidavit to the effect that the affiant "has cause to suspect and does believe" that illicit liquor was located on certain premises did not sufficiently apprise the issuing magistrate of the underlying "facts or circumstances" from which "*he* can find probable cause." 290 U. S., at 47 (emphasis added). In *Aguilar,* a sworn assertion that the informant was "a credible person" was held insufficient to enable the magistrate to assess that conclusion for himself. Only two Terms ago, we held a warrant constitutionally defective because "[t]hough the

[3] The Government makes brief reference to the assertion that the informant's verbal statement to the affiant was "sworn." Government's Brief, p. 13, n. 2. I do not see how this affects the case. Surely there is no reason to suspect that this indicates the confidant anticipated potential perjury proceedings if he were subsequently proved a liar. Nor does that assertion reveal, in any meaningful sense, what sort of relationship this might have reflected or created between the agent and his informer.

affiant swore that his confidant was 'reliable,' he offered the magistrate no reason in support of this conclusion." *Spinelli* v. *United States,* 393 U. S., at 416. Reading the assertion that the informer in this case was "prudent" in the broadest conceivable commensense fashion, it does no more than claim he was "credible" or "reliable," *i. e.,* that he was likely telling the truth.[4] Such an assertion, however, is no more than a conclusion which the Constitution requires must be drawn independently by the magistrate. What this portion of the affidavit lacks are any of the underlying "facts or circumstances" that informed the agent's conclusion and whose presentation to the magistrate would enable him to assess the probability that this determination was sufficiently plausible to justify authorizing a search of respondent's premises.

B

Nor do I think this void is filled by the fact that the informant claimed to speak from his personal knowledge. It is true that in *Nathanson* the Court was not dealing with the sufficiency of the allegations respecting one or more of the above described components of probable cause, but merely with a bare overall statement of the affiant that probable cause existed. Further, as the Government notes, our chief, but not sole, emphasis in *Aguilar* was upon the absence of any evidence communicated by the affiant from which a magistrate could infer that the confidant gathered his evidence from a reliable source. From this, the Government contends that *Aguilar's* reliability-of-the-informer test is not

[4] The Court of Appeals in reversing respondent's conviction stated that "[t]he allegation that [the informant] is a 'prudent person' signifies that he is circumspect in the conduct of his affairs, but reveals nothing about his credibility." 412 F. 2d, at 797–798. I consider this a too restrictive construction of the affidavit and cannot accept that aspect of the reasoning of the Court of Appeals.

applicable in full force where, as here, it does seem clear that the sources of the informer's belief, if truthfully reported, were reliable. I think this argument makes too much of the circumstances of our previous cases. The central point of the discussion of probable cause in *Aguilar* is, as perhaps more precisely emphasized by our explicit twin holdings in *Spinelli*, see 393 U. S., at 416, that the two elements necessary to establish the informer's trustworthiness—namely, that the tip relayed to the magistrate be both truthful and reliable—are analytically severable. It is not possible to argue that since certain information, if true, would be trustworthy, therefore, it must be true. The possibility remains that the information might have been fabricated. This is why our cases require that there be a reasonable basis for crediting the accuracy of the observation related in the tip. In short, the requirement that the magistrate independently assess the probable credibility of the informant does not vanish where the source of the tip indicates that, if true, it is trustworthy.

This is not to say, however, that I think the fact of asserted personal observation can never play a role in determining whether that observation actually took place. I can perceive at least two ways in which, in circumstances similar to those of this case, that information might be taken to bear upon the informer's credibility, as well as upon the reliability of his sources of information. For example, to the extent that the informant is somehow responsible to the affiant, the fact of asserted personal observation might be of some value to a magistrate in assessing the informer's credibility. In such circumstances, perhaps a magistrate could conclude that where the confidant claimed to speak from personal knowledge it is somewhat less likely that the informant was falsifying his report because, if the search yields no fruit, when called to account he would be unable to

explain this away by impugning the veracity or reliability of his sources. However, no such relationship is revealed in this case.

Additionally, it might be of significance that the informant had given a more than ordinarily detailed description of the suspect's criminal activities. Although this would be more probative of the reliability of the information, it might also permissibly lead a magistrate, in an otherwise close case, to credit the accuracy of the account as well. I do not believe, however, that in this instance the relatively meager allegations of this character are, standing alone, enough to satisfy the credibility requirement essential to the sufficiency of this probable cause affidavit. Reading this aspect of the affidavit in a not unduly circumspect manner, the allegations are of a character that would readily occur to a person prone to fabricate. To hold that this aspect of the affidavit, without more, would enable "a man of reasonable caution," *Berger* v. *New York*, 388 U. S. 41, 55 (1967), to conclude that there was adequate reason to believe the informant credible would open the door to the acceptance of little more than florid affidavits as justifying the issuance of search warrants.

C

Some members of the Court would reverse the judgment below on the grounds that the magistrate might properly have credited the informant's assertions because they confessed to the commission of a crime. This rationale is advanced not withstanding the Government's failure even to suggest it.

Had this argument been pressed upon us, I would find it difficult to accept. First, the analogy to the hearsay exception is quite tenuous. The federal rule, although it is often criticized, is that declarations against penal interest do not fall within this exception. *Donnelly* v. *United States*, 228 U. S. 243 (1913). More-

over, because it has been thought that such statements should be relied upon by factfinders only when necessity justifies it, the rule universally requires a showing that the declarant cannot be produced personally before the trier of fact, McCormick, Evidence §§ 253, 257 (1954), an element not shown to be present here. See Part V, *infra*. Finally, we have not found any instance of the application of this rule where the witness declined to reveal to the trier of fact the identity of the declarant, presumably because without this knowledge it cannot be readily assumed that the declarant might have had reason to suspect the use of the statement would do him harm. Thus, while strict rules of evidence certainly do not govern magistrates' assessments of probable cause, it would require a rather extensive relaxation of them to permit reliance on this factor. And these rules cannot be completely relaxed, of course, since the basic thrust of *Spinelli, Aguilar, Nathanson, Whiteley,* and *Giordenello, supra,* is to prohibit the issuance of warrants upon mere uncorroborated hearsay. The simple statement by an affiant that an unspecified individual told the affiant that he and another had committed a crime, where offered to prove the complicity of the third party, is little, if any, more than that.

Secondly, the rationale for this exception to the hearsay rule is that the fact that the declaration was against the speaker's self-interest tends to indicate that its substance is accurate. 5 Wigmore, Evidence § 1457 (3d ed. 1940). But where the declarant is also a police informant it seems at least as plausible to assume, without further enlightenment either as to the Government's general practice or as to the particular facts of this case, that the declarant-confidant at least believed he would receive absolution from prosecution for his confessed crime in return for his statement. [This, of course, would not be an objection where the declarant is not also

the informant. See *Spinelli, supra*, at 425 (WHITE, J., concurring).] Thus, some showing that the informant did not possess illusions of immunity might well be essential.

Thirdly, the effect of adopting such a rule would be to encourage the Government to prefer as informants participants in criminal enterprises rather than ordinary citizens, a goal the Government specifically eschews in its brief in this case upon the explicit premise that such persons are often less reliable than those who obey the law. Brief for the United States, at 14.

In short, I am inclined to the view, although I would not decide the question here, that magistrates may not properly predicate a determination that an unnamed confidant is credible upon the bare fact that by giving information he also confessed to having committed a crime. More importantly at this juncture, it seems to me quite clear that no such rule should be injected into our federal jurisprudence in the absence of any representation by the Government that the factual assumptions underlying it do, indeed, comport with reality, and in the face of the Government's apparent explicit assertion, in this very case, that those able to supply information sufficient to establish probable cause under such a new rule would tend to be less reliable than those who cannot. The necessity for this haste to embrace such a speculative theory, without any argument from those who will be affected by it, wholly escapes me.

IV

Finally, it is argued that even if the tip plus the affiant's assertion that the informant was "prudent" did not provide a reasonable basis for the magistrate's conclusion that the confidant was credible, two other factors would have sufficed. First, at some time in the past four or more years, in an abandoned house "under Harris'

control," the local constable had located "a sizeable stash of illicit whiskey." While an assertion of "prior events within the affiant's own knowledge . . . indicating that the defendant had previously trafficked in contraband," *ante*, at 7, admittedly did not appear in the affidavit held insufficient in *Spinelli*, this hardly distinguishes that case in any purposeful manner. Surely, it cannot seriously be suggested that, once an individual has been convicted of bootlegging, any anonymous phone caller who states he has just personally witnessed another illicit sale (up to four years later) by that individual provides federal agents with probable cause to search the suspect's home. I can only conclude that this argument is a make-weight, intended to avoid the necessity of calling for an outright overruling of *Spinelli*.

Secondly, the claim is made that a magistrate could conclude the confidant here was credible because the agent had "received numerous information from all types of persons as to [respondent's] activities." To rely on this factor alone, of course, is flatly inconsistent with *Spinelli*, where we held that "the allegation that Spinelli was 'known' to the affiant and to other federal and local law enforcement officers as a gambler and an associate of gamblers is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." *Spinelli, supra*, at 414. In the instant case, the affiant did not purport to "know" respondent was a dealer in illicit whiskey, nor did he identify the source of his information to that effect.

Nevertheless, the contention is advanced that this aspect of *Spinelli* had "no support in our prior cases, logic, or experience," *ante*, at 9, and thus should be discarded. However, *Nathanson* held that "[m]ere affirmance of belief or suspicion is not enough" to establish probable cause for issuance of a warrant to search a private dwelling. 290 U. S., at 47. It is argued that *Nathanson* "was

limited to holding that reputation, *standing alone*, was insufficient." *Ante*, at 8. But this is the precise problem here—only the respondent's reputation has been seriously invoked to establish the credibility of the informant, an element of probable cause entirely severable from the requirement that the confidant's source be reliable. See Parts I and III of this opinion.

A narrower view of *Nathanson* is said to be confirmed by reading *Brinegar* v. *United States*, 338 U. S. 160 (1949), to have "held proper the assertion of the searching officer that he had previously arrested the defendant for a similar offense and that the defendant had a reputation for hauling liquor." *Ante*, at 8. But *Brinegar* itself was very carefully limited to situations involving the arrest of those driving moving vehicles, 338 U. S., at 174, 176–177, a problem that has typically been treated as *sui generis* by this Court. Further, the Court in *Brinegar* specifically held the arrest valid "[w]holly apart from [the agent's] knowledge that [the suspect] bore the general reputation of being engaged in liquor running." *Id.*, at 170. While it is true that *Jones* v. *United States*, 362 U. S. 257, 271 (1960), cites the fact that the informant's "story was corroborated by other sources of information," the opinion nowhere suggests that this factor, standing alone, would have been sufficient to enable a magistrate to assess the confidant's reliability. At least equal emphasis was placed upon the informant's previously proven veracity and his tangible proof of actual observation of the illegal activity.

Thus, I conclude that *Spinelli* and *Nathanson*, without contradiction, stand for the proposition that the magistrate could not establish the likely veracity of the unidentified informant on the grounds that his story coincided, in unspecified particulars, with rumors circulated by unknown third parties. I am not certain what is meant by the claim that such a rule of law is illogical.

It would, indeed, be illogical to argue that the agent could not have relied upon information as to respondent's reputation that he deemed credible and reliable in concluding that the informant had likely told the truth. But it was not the agent's task to determine whether a search warrant should issue. This was the magistrate's responsibility. As to the magistrate, I confess that I do not comprehend, where the issue is whether the confidant is to be believed, how the agent's assertion that he had "received information from all types of persons as to [respondent's] activities," can, as a matter of logic or experience, be accurately described as other than "a bald and unilluminating assertion of suspicion." It is, at best, a conclusory statement that respondent had a deserved reputation as a dealer in illicit whiskey. The Fourth Amendment, I repeat, requires that such conclusions be drawn, from the underlying facts and circumstances, by the magistrate, not the agent.

V

The Government has earnestly protested that the result below, if permitted to stand, will seriously hamper the enforcement of the federal criminal law. It is said that if this affidavit is insufficient to support the issuance of a search warrant, it will be extremely difficult to meet the Fourth Amendment's standards where the informer, although apparently quite credible, has never before given accurate information to law enforcement officers, especially where he, or the agent, is unwilling to have the informant's identity disclosed. It would, indeed, be anomalous if the Fourth Amendment dictated such results, for it surely was never intended as a hindrance to fair, vigorous law enforcement. Further, I think there is much truth in the Government's supporting assertion that the ordinary citizen who has never before reported a crime to the police may, in fact, be more reliable than

one who supplies information on a regular basis. "The latter is likely to be someone who is himself involved in criminal activity or is, at least, someone who enjoys the confidence of criminals." Government's Brief, at 14.[5]

I do not, however, share the Government's concern that a judgment of affirmance would have such a constricting effect on legitimate federal law enforcement. For example, it would seem that such informers could often be brought before the magistrate where he could assess their credibility for himself. We cannot assume that the ordinary law-abiding citizen has qualms about this sort of cooperation with law enforcement officers. And I do not understand the Government to be asserting that effective law enforcement will often dictate that the identity of informants be kept secret from federal magistrates themselves. Moreover, it will always be open to the officer to seek corroboration of the tip.

Beyond these considerations, I do not understand why a federal agent, who has determined a confidant to be "reliable," "credible," or "prudent" cannot lay before the magistrate the grounds upon which he based that judgment. I would not hold that a magistrate's determination that an informer is "prudent" is insufficient to support the issuance of a warrant. To the contrary, I would only insist that this judgment be that of the magistrate, not the law enforcement officer who seeks the warrant.

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[5] Of course, the magistrate was presented no evidence that this is, in fact, such a case. Indeed, the very allegations in the affidavit to the effect that the informant here had been a frequent purchaser from respondent would suggest that he "is, at least, someone who enjoys the confidence of criminals." The Government's argument, as I understand it, is that the affidavit in this case is typical of those that can be produced by agents who rely on first-time informers not bound up themselves in criminal activity. As I point out below, if this had been the situation here, and that fact had been communicated to the magistrate, this would be a very different case.

Without violating the confidences of his source, the agent surely could describe for the magistrate such things as the informer's general background, employment, personal attributes that enable him to observe and relate accurately, position in the community, reputation with others, personal connection with the suspect, any circumstances which suggest the probable absence of any motivation to falsify, the apparent motivation for supplying the information, the presence or absence of a criminal record or association with known criminals, and the like.

VI

This affidavit is barren of anything that enabled the magistrate to judge for himself of the credibility of the informant. We should not countenance the issuance of a search warrant by a federal magistrate upon no more evidence than that presented here. A person who has not been shown to possess any of the common attributes of credibility, whose name cannot be disclosed to a magistrate and whose information has not been corroborated is precisely the sort of informant whose tip should not be the sole basis for the issuance of a warrant, if the constitutional command that "no Warrants shall issue, but upon probable cause" is to be respected. And the assertion that such a person may be believed where he confesses that he is a criminal or where his statements dovetail with other, unspecified rumors carries its own refutation. With all respect, such an analysis bespeaks more a firm hostility to *Aguilar*, *Nathanson*, and *Spinelli* than a careful judgment as to the principles those cases reflect. Despite all its surface detail, this affidavit cannot be sustained without cutting deeply into the core requirement of the Fourth Amendment that search warrants cannot issue except upon the independent finding of a neutral magistrate that probable cause exists.

For these reasons, I dissent.